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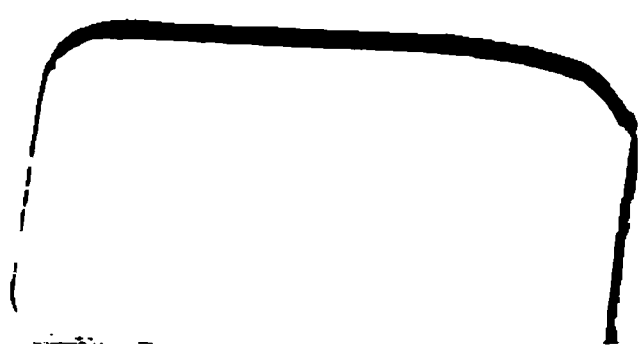
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CITY OF VANCOUVER
LAW DEPARTMENT

CANADIAN EDITION OF
THE
LAW OF TORTS.

BY

J. F. CLERK,

OF THE INNER TEMPLE AND THE SOUTH-EASTERN CIRCUIT, BARRISTER-AT-LAW,

AND

W. H. B. LINDSELL,

OF LINCOLN'S INN AND THE MIDLAND CIRCUIT, BARRISTER-AT-LAW.

BEING THE LATEST ENGLISH EDITION AS REVISED BY

MR. WYATT PAINE,

WITH

CANADIAN NOTES

ON THE DECISIONS AND STATUTES OF THE ENGLISH-SPEAKING
PROVINCES OF THE DOMINION.

BY

A. T. HUNTER, LL.B.,

OF OSGOODE HALL, BARRISTER-AT-LAW.

LONDON :

SWEET & MAXWELL, LIMITED.

TORONTO :

THE CARSWELL COMPANY, LIMITED.

1908.

BRADBURY, AGNEW, & CO. LD., PRINTERS,
LONDON AND TONBRIDGE.

PREFACE TO THE FOURTH EDITION.

DURING the very short period which has elapsed since the issue of the Third Edition of Clerk and Lindsell on Torts a considerable number of actions dealing with the wrongful invasion of the civil rights of individuals have been adjudicated upon by the Courts. In particular, very important cases are *Scarborough v. Cosgrove* (a), relating to the liability of boarding-house keepers for negligence; *The Attorney-General and Monmouth County Council v. Scott* (b), discussing alike the duties and obligations of local authorities with regard to repairs, and of persons using the King's highway for extraordinary traffic; and *Kine v. Jolly* (c), and *Higgins v. Betts* (d), upon the *quantum* of obstruction to ancient lights which will entitle an aggrieved party to a mandatory injunction.

In the present edition the Editor has endeavoured, not only to epitomize the effect of these and very many other recent decisions, but also, by incorporating in the text a considerable number of the longer foot-notes contained in the earlier edition, generally to facilitate reference and thereby to enhance the utility of the work to the legal practitioner.

(a) (1905) 2 K. B. 805, C. A.
(b) (1904) 1 K. B. 404, C. A. ; but see
S. C. (1905) 2 K. B. 160, C. A. See
also *Chichester Corporation v. Foster*,
(1905) 22 T. L. R. 18 ; and *Hemsicorth*

Rural Council v. Micklethwaite, (1904)
2 L. G. R. 1084.

(c) (1905) 1 Ch. 480, C. A.

(d) (1905) 2 Ch. 210.

The last few sessions of Parliament have not been prolific in Legislation germane to a work on Torts; the Trade Marks Act, 1905, as consolidating and amending the law on this important subject (*a*), is, however, a much needed addition to the Statute Book, and has been dealt with at considerable length in the present volume.

The Railway Fires Act (*b*) (which comes into operation on January 1st, 1908), and is interesting as applying, to some extent, the old common law right of action to the case of persons injured by the Torts of corporations, acting in pursuance of Statutory Powers, is also discussed in the text.

The Editor desires to express his indebtedness to his friend Mr. Harold B. Barkworth, of the Inner Temple and Western Circuit, Barrister-at-Law, for valuable assistance in revision throughout the work.

WYATT PAINE.

4, HARCOURT BUILDINGS,

TEMPLE, E.C.

February, 1906.

(*a*) 5 Edw. VII. c. 15.

(*b*) 5 Edw. VII. c. 11.

PREFACE TO THIRD EDITION.

PROBABLY in no branch of Law is the process of evolution, so essentially characteristic of every living system of jurisprudence when untrammelled by the fetters of codification, more conspicuous than in that which treats of civil wrongs to the individual and their appropriate remedies, in contradistinction to those felonies and misdemeanours which are punishable by the State as offences against society at large.

It is consequently small matter for surprise that during the eight years that have elapsed since the issue of the last edition of Clerk and Lindsell on Torts many considerable and important changes have taken place in that wide field of Law with which a Treatise on so extensive a subject necessarily deals.

Having regard to the varied modifications resulting from judicial decisions and legislation, and the large number of modern cases of importance, the Editor of the present edition ; in his endeavour to preserve the original scope and style of the work and to eliminate none of those features which have earned for the earlier editions so worthy a place among standard legal treatises, and yet at the same time to bring the work up to date ; has found it necessary somewhat to increase the size of the volume.

Something has been rewritten, much added, and, it is

believed, the whole of the subject-matter thoroughly and completely revised.

The Index, always a matter of the first importance to a practising lawyer, has been carefully collated and considerably amplified; whilst among other novel features will be found the introduction of Head Notes to each chapter, indicating the more important matters dealt with therein; a Table of Statutes; and the addition of Dates to all references to decisions alike in the Table of Cases and at the foot of each page where they originally occur.

The Editor desires to express his indebtedness to his friend Mr. Harold B. Barkworth, of the Inner Temple and Western Circuit, Barrister-at-Law, for valuable assistance in revision throughout the work.

July, 1904.

* * * * *

In compliance with a suggestion of the Publishers, this Third Edition of Clerk and Lindsell on Torts is produced as a companion volume to the Fourteenth Edition of Chitty on Contracts.

The Editors of these works, though each of them solely responsible for his own book, have had the advantage of frequently conferring with one another both on points of arrangement and difficulty.

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(*a*) References to R. S. C., 1896, in parenthesis.

(*b*) With old sections under 55 & 56 Vict. c. 29 in parenthesis.

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ERRATUM.

Page 100, note (e), for "5 Ed. VII. c. 100," read "c. 10."

ERRATA TO CANADIAN NOTES.

- Page 39b, note (k), line 2,** for "2 N. S. R.," read "2 N. S. D."
Page 39c, transpose notes "(e)" and "(f)."
Page 39e, note (c), before "O. L. R.," insert "2."
Page 112g, note (b), for "34 S. C. R.," read "24 S. C. R."
Page 117a, note (b), after "Chadd v. Meagher," read "24 U. C. C. P."
Page 130, note (i), read "Byrnes v. Wild."
Page 130b, note (g), after "Anderson v. Grace," read "17 U. C. R. 96."
Page 130d, note (e), after "Ontario Industrial Loan, &c., Co. v. Lindsay," read
"3 O. R. 66 ; 4 O. R. 473."
Page 162a, note (h), in first line read "17 U. C. C. P."
Page 186b, note (l) for "Neville," read "Nevills."
Page 283a, note (b), after "7 O. L. R.," insert "385."
Page 283b, note (k), after "Walsh v. Brown," read "18 U. C. C. P. 60."
Page 322f, note (f), after "Roe v. Roper," read "23 U. C. C. P. 76."
Page 322g, note (d), after "Beatty v. Rumble," read "21 O. R. 184."
Page 379d, note (a), after "Slee v. Grahman," read "2 U. C. R. 387."
Page 672a, note (d), after "Longueuil Navigation Co. v. City of Montreal,"
read "15 S. C. R. 566."

N. B.—The R. S. C., 1906, came out after some of the chapters had gone through the press. The corrections have been carried into the Index to Statutes.

THE LAW OF TORTS.

CHAPTER I.

INTRODUCTORY.

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A TORT may be described as a wrong independent of contract, for which the appropriate remedy is a common law action. In order, therefore, to discover what a tort is, we must examine the various kinds of action which the law has from time to time recognised, not on any systematic theory, but according to the dictates of experience and convenience, and eliminate from the list those which are dependent on contract.

What is a tort.

It is impossible to define the general term otherwise than by an enumeration of particulars (a). In every action there must be a plaintiff and a defendant, the former alleging a right in himself and a corresponding duty on the latter, which right has been infringed, and which duty has been broken. A cause of action of contract arises not merely where one party has broken a legally binding agreement with the other, but where two parties stand in such a mutual relation that a sum of money is legally due from the one to the other, in which case the law is said to imply

(a) Formerly an injured husband could sue the seducer of his wife in an action of criminal conversation. The seduction, therefore, was a tort. As the law now stands, the husband's remedy is by a petition in the divorce court (20 & 21 Vict. c. 85, ss. 33, 59). The

alteration is merely in procedure, for the same redress is given as before and on the same principles. Yet it would seem that as the essential character of a tort is the form of remedy, the change must be considered as taking the seduction of a married woman out of the class of torts.

INTRODUCTORY.

a contract to pay the money. Where a statute imposes a penalty on one man in favour of another, the penalty is recoverable usually in an action of debt, which in form is an action of contract. But where there is a breach of duty imposed by the law apart from any consent of the person owing the duty, and the remedy claimed is not the payment of a definite sum of money but pecuniary compensation for the injury, then we have a wrong independent of contract which gives rise to an action of tort (a).

Independent
of contract.

The expression "independent of contract" is one that requires explanation, for there may be a tort which arises out of a breach of contract and yet is independent of it. At a time when the forms of action were strictly distinguished in pleading, it was often allowable to declare in tort on a breach of duty which arose simply in consequence of the agreement of the parties. Thus, if a banker improperly dishonoured a customer's cheque, he might be sued in tort (b). So if a bailee by some careless act damages goods entrusted to him, he probably commits a breach of the express or implied contract of bailment, but he is also guilty of a tort, for everyone is bound to take care that he does not damage the property of another (c). As between the parties to the contract themselves the fact of the existence of this double remedy is immaterial, for the law looks at the substance of the thing, and does not permit the form of action to alter rights which are defined beforehand by the consent of those immediately concerned (d); but as regards the rights of third parties an act is none the less a tort because it is also a breach of contract. If a father employs a medical man to attend on his son, and the latter is injured by unskilful treatment, the father has a remedy for the breach of the contract, but the son has also a remedy for the tort (e). "Suppose A. lets B. a horse, B. with C.'s licence

(a) The statutory remedy of an action against the police authority of a district in respect of property damaged in riots, which has been substituted for the old action against the hundredors (49 & 50 Vict. c. 38), stands outside this classification altogether.

(b) *Marzetti v. Williams*, (1830) 1 B. & Ad. 415.

(c) *Hayn v. Culliford*, (1879) 4

C. P. D. 182. An action founded on the common law liability of a bailee is an action founded on tort within the meaning of s. 116 of the County Courts Act, 1888 (*Turner v. Stallibrass*, (1898) 1 Q. B. 56, C. A.).

(d) *Marzetti v. Williams*, *supra*.

(e) *Gladwell v. Steggall*, (1839) 5 Bing. N. C. 733.

puts up at C.'s stables for reward to C. from B., C. turns into the stables loose a vicious horse, known to be so, not to injure A.'s horse, but not thinking of the matter; there cannot be a doubt that C. would be liable to A. if the horse was injured (a). So if he gave the horse bad oats which injured the horse he would be liable" (b). So if A. in breach of contract supplies to B. a chattel dangerous by reason of a latent defect, and B. using it in the way contemplated by the parties, entrusts it to C., who thereby suffers damage, C. has an action of tort against A. (c).

In all these cases the injury arises out of a breach of contract; the injured party has to show how the duty arose towards him by proving the contract as one of the facts of the case, but the wrong is independent of contract because the defendant has not contracted with the plaintiff to perform any duty; the law has imposed it upon him.

There is another kind of case which, although the cause of action involves a breach of contract, is yet independent of contract, inasmuch as there is no contract between the parties. If A. knowing that B. has made a contract with C. maliciously induces B. to break that contract, and C. is thereby damnified, the latter can not only sue B. for his breach of contract, but has also an action of tort against A. for procuring that breach (d).

Although, as has been already pointed out, it is impossible to lay down any general principle to which all actions of tort may be referred, it will be found that they are in the main directed to afford the simple remedy of pecuniary satisfaction for direct and obvious invasions of the three elementary rights of civilised society—the right of personal liberty and security, the right of reputation, and the right of property.

What invasions of right constitute a tort.

Under this last head must be included not merely those various

Rights of property.

(a) Although B. would also have a right of action against C. (*The Winkfield*, (1902) P. 42); see also *The Millwall*, (1905) 91 L. T. 695.

(b) *Per* Bramwell, L.J., *Hayn v. Culliford*, (1879) 4 C. P. D. p. 185.

(c) *George v. Skirington*, (1869) L. R. 5 Ex. 1; *Elliot v. Hall*, (1885) 15 Q. B. D. 315.

(d) *Quinn v. Leathem*, (1901) A. C. 495; *Taff Vale Railway v. Amalgamated*

Society of Railway Servants, (1901) A. C. 426; *Glamorgan Coal Co. v. South Wales Miners' Federation*, (1903) 1 K. B. 118 and 2 K. B. 545; affirmed *sub nom. South Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A. C. 239; *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, (1903) 2 K. B. 600, C. A.; *Bowen v. Hall*, (1881) 6 Q. B. D. 333.

rights and interests, corporeal and incorporeal, with their respective incidents, which are capable of transfer from one to another, and which in ordinary language are intended when the term property is used, but also all those collateral rights of a personal nature by means of which men are enabled to acquire, enjoy and preserve their property. "Private property," it has been said, "is either property in possession, property in action, or property that an individual has a special right to acquire. . . . A man in trade has a right in his fair chances of profit, and he gives up time and capital to obtain it" (a). In other words, the right to earn a living by all lawful means may in a certain limited sense be said to be a right of property.

Domestic rights, in so far as they are recognised in the law of torts, may be classified as rights of property. A father has a right to the service of his child up to the age of twenty-one years, and for the loss of that service he may have his action (b); but a

(a) *Per Cur.*, *Hannam v. Mockett*, (1824) 2 B. & C. p. 937.

(b) This right of the father to the custody (*In re Agar Ellis*, (1883) 24 Ch. D. 317) and to the services (*Dean v. Peel*, (1804) 5 East, 45) of his child exists up to the age of twenty-one. But the extent to which that right can be enforced has been considerably modified in modern times. From the point of view of the early common law the *status* of a child was one of qualified servitude; it was regarded as the chattel of the father. In course of time, however, even the Courts of Common Law came to limit the parent's rights to this extent, that after the child had arrived at a certain age—fourteen in the case of boys (*In re Shanahan*, (1852) 20 L. T. 183), sixteen in that of girls (*Reg. v. Howes*, (1860) 3 E. & E. 332)—they refused to assist the father to regain possession of the child for the purpose of enforcing his rights, even though no misconduct on the father's part were proved; and they also refused to allow a father to apprentice his child to another person without the child's consent (*R. v. Arnesby*, (1820) 3 B. & A. 584, dissenting from the earlier authority of *Com. Dig. tit. Justices of the Peace*,

B. 55). But though the Courts of Common Law would not assist the parent in enforcing his rights against his child after the ages of fourteen or sixteen as the case might be, they apparently allowed him to take the law into his own hands and to maintain his rights by force (see below, p. 215), and they also allowed him to recover damages for any interference with his rights by a third person, by injuring, debauching, or enticing away the child, up to the age of twenty-one. On the other hand, the Court of Chancery looked at the question of the custody of the child from the point of view, not of the father's rights, but of his duties. It considered only the welfare of the child, and claimed under the authority delegated to it by the Crown, as the supreme *parens patriæ*, to control and, if necessary, to supersede the natural right of the parent (*per* Lord Cottenham, *In re Spence*, (1847) 2 Ph. 247). The Court had an absolute discretion to regulate the custody of the child up to the age of twenty-one; but in the absence of misconduct on the part of the parent, or of facts showing that it was obviously for the benefit of the child that it should live elsewhere it would only exercise

child by the common law has no corresponding remedy for the loss of the protection and support of his father, insomuch as he has nothing therein in the nature of a right of property. By statute (a), however, he may recover compensation for the pecuniary loss caused by an act wrongful in itself, and resulting in the death of his father. It is, to say the least, very doubtful, however, whether, except under the statute above referred to, a wife can recover for the loss of the *consortium* of her husband (b). But a husband may sue for the loss of his wife's service; and although he can no longer compel his wife to live with him by taking forcible possession of her person (c), it is apprehended that his right to the *consortium* and services of his wife must still be regarded as a valid and subsisting right available as

its discretion in one way, that of giving the custody to the father. For *primâ facie* the Court, "whatever be its authority or jurisdiction, has no right to interfere with the sacred right of a father over his own children" (*per* Bacon, V.-C., *In re Plomley*, (1882) 47 L. T. N. S. p. 284), it being *primâ facie* of the greatest benefit to the child to be with its father (*per* Kindersley, V.-C., *In re Curtis*, (1859) 28 L. J. Ch. 458; *per* Lindley, L.J., *In re McGrath*, (1893) 1 Ch. 143). In the exercise of this discretion, the Court of Chancery did not, like the Courts of Common Law, refuse to restore a child to its father after the age of fourteen or sixteen (*Todd v. Lyne*, Times, 26 July, 1873).

Now by s. 25, subsec. 10, of the Judicature Act, in questions relating to the custody of infants, the rules of equity prevail. The net result of the common law, as modified by that provision, may be expressed in the following propositions:—

1. A father has, in the absence of misconduct on his part, and until interference by the Court, a right to the custody and services of his children of either sex unmarried up to the age of twenty-one, for infringements of which right he has as against third persons a remedy in damages; and for the purpose of enforcing it as against the child he probably may keep or retake

possession of his child's person by force.

2. He probably loses those rights by misconduct, even without the intervention of the Court (see below, pp. 215–217).

3. The Court, upon its aid being invoked to recover possession of the child, has an absolute discretion to dispose of the child's custody, even though there be no misconduct on the part of the parent. But, except in extreme cases, it will always consider it to be to the best interests of the child to be with its father.

4. That discretion the Court will exercise so long as the child is under twenty-one. The old common law distinction between children under the ages of fourteen or sixteen and children over those ages, must be regarded as obsolete. (It is submitted that the dicta of Lord Esher, M.R., and Smith, L.J., in *Reg. v. Gynghall*, (1893) 2 Q. B. at pp. 245, 253, to the contrary, are not law. It will be observed on reference to that case, that Kay, L.J., did not express any assent to their proposition.)

(a) 9 & 10 Vict. c. 93; and see 60 & 61 Vict. c. 37.

(b) In *Lynch v. Knight*, (1861) 9 H. L. C. 577, Lord Wensleydale expressly held that she could not. The other law lords expressed opinions in the contrary sense, but their judgments did not turn on this point, see below, p. 228.

(c) *Reg. v. Jackson*, (1891) 1 Q. B. 671

against third persons, and that the case of *Winsmore v. Greenbank* (a), where an action was held to lie for persuading a wife to continue absent from her husband, is still good law (b).

The decision in *Ashby v. White* (c), that the malicious refusal of a returning officer to accept the vote of a duly qualified elector was a tort as well as a breach of public duty, probably rested on the notion that the political franchise, like other franchises, was to be regarded as a right of property. It is, perhaps, doubtful whether at the present date such a principle would, apart from authority, find acceptance.

Conflict of
rights.

It is obvious that unless the rights of individuals are modified and limited they must be frequently in conflict one with another. No man can always do as he pleases, except by preventing other people doing as they please. "The due regulation and subordination of conflicting rights constitute the chief part of the science of law. It is impossible to give any rule applicable to all cases which may arise, except the general one that whenever damage is caused to one man by another the law, in deciding which shall bear the loss, is governed by principles of expediency, modified by public sentiment" (d).

How
adjusted.

In many cases where there is a conflict of interests the law does not interfere, but leaves each individual to do the best he can for himself. If one landowner has a well, and his neighbour digs a well in the adjoining close, which drains away the percolating water and leaves the first well dry, the owner cannot complain, for his neighbour has as good a right as he to the subterranean flow. His remedy is to dig deeper (e). So, a landowner may ward off a sudden flood, although the effect be to throw the water on to another man's land (f). Sometimes a right or license (g) is given subject to the condition that it be used with care. Thus the highway is open to all, but every passenger is bound to do his best not to impede or injure other passengers (h). Sometimes

(a) (1745) Willes, 577.

(b) And see *Smith v. Kaye and Another*, (1904) 20 T. L. R. 261.

(c) (1703) Lord Raym. 938. An action will not lie against a Member of Parliament for refusing to present a petition to Parliament (*Chaffers v. Goldsmid*, (1894) 1 Q. B. 186).

(d) Addison on Torts, 8th ed. p. 17.

(e) *Chasemore v. Richards*, (1859) 7 H. L. C. 349.

(f) *Nield v. London & North Western R. Co.*, (1874) L. R. 10 Ex. 4.

(g) *Gibbings v. Hungerford*, (1904) 1 Ir. R. 211, C. A.

(h) Where, however, the tendency of

the only limitation to a right is that it must be exercised in good faith. Sometimes, again, the law subordinates the one right to the other. Thus, a landowner has a right to dig and carry away his own soil, but if in so doing he lets down the soil of his neighbour he is answerable; for the right of the latter to have his soil supported is the better right of the two.

Where a right exists there must be a corresponding duty to observe that right, and a tort may be spoken of either as a breach of duty or an infringement of a right. It is convenient to use the latter expression where the act is wrongful in itself apart from its consequences, for then its injurious character is best ascertained by an accurate definition of the right of the party aggrieved. But where an injury is consequential only it is more convenient to consider the nature of the duty. If a defendant has been guilty of negligence it makes no difference in the character of his liability whether he injured the person or the goods or the land of the plaintiff.

Right implies corresponding duty.

Torts may be divided into three classes: first, those in which a party is liable simply because he has done or omitted to do something, which of itself amounts to an infringement of right or a breach of duty; secondly, those in which the conduct of the wrong-doer has been unlawful only by reason of his failure to exercise proper care and skill; thirdly, those in which there must be an element of moral misconduct.

Three classes of torts.

1. A trespass, that is to say, a direct physical interference with the person, land, or goods of another, is as a rule actionable in itself, however innocent the conduct of the wrong-doer may be. If A. walk over B.'s field without permission, he may have no knowledge of the owner's right nor intention to injure him; he may reasonably believe that he is using a public footpath; but his good faith and absence of negligence, although they may be very material in considering the damages that shall be awarded against him, do not alter the fact that he has been guilty of a legal wrong (*a*). The only question is whether the very act which constitutes the trespass is his act. That is a man's act

Acts wrongful in themselves. Trespass.

Wilful trespass.

a particular class of users of the highway is to subordinate the rights of the general public to their own selfish interests, the law will impose certain

restrictions upon them (the Motor Car Act, 1903).

(*a*) *Basely v. Clarkson*, (1682) 3 Lev. 37.

which he wills to do, exercising a choice between acting and forbearing, and the strongest moral compulsion still leaves freedom of such choice. Therefore where the defendant had formed one of a party who committed a trespass, it was held no answer to plead that his co-trespassers had compelled him by menaces to accompany them (a). So it will seem that if a man finding himself in the neighbourhood of a dangerous animal goes where he has no right, in order to secure his safety, he is a trespasser; but if being pursued, in the blindness of fear, he takes refuge in the same place, then since he exercises no choice he cannot be considered a voluntary agent and commits no wrong. This proposition would seem to be involved in the well-known American decision (b), where it was held that the defendant was liable in trespass, because a boy whom he had pursued with uplifted weapon rushed headlong into a shop and did damage there, for if the boy were a trespasser, other than in relation, his entry could not well be the act of the defendant. If A. driving along the high road and seeking to avoid a collision with B. comes into contact with C., he may be liable to C. if he be negligent, but not otherwise. But if in order to avoid B., he directs his vehicle against C., making as it were a choice of evils, this of itself constitutes a good cause of action, because he has chosen to do the very thing which infringes C.'s right (c). And, *primâ facie*, there is evidence of negligence, on the part of the owner, if, in broad daylight, a runaway horse and cart cause injury in a public street (d).

Negligent
trespass.

It is to be observed that under the form of the action of trespass were included wrongs essentially diverse in their nature. If a man aims at another with his gun and wounds him, here the wounding is the very thing which he intends; but if he fires carelessly and hits a passer-by, in this case the wound cannot be said to be his act, that is to say, the thing which he chooses to do; it is rather the consequence of his act (e). In both cases

(a) *Gilbert v. Stone*, (1647) Aleyn, 35.

(b) *Vandenburg v. Truax*, (1847) 4 Denio, 464.

(c) *Holmes v. Mather*, (1875) L. R. 10 Ex. 261. As to the liability of infants of tender years, and lunatics for their trespasses, see below, pp. 46-48.

(d) *Snee v. Durkie*, (1903) 6 F. 42, Ct. of Sess.

(e) As to responsibility when the immediate cause of the accident is the act of a third party, see *Sullivan v. Creed*, (1904) 2 Ir. R. 317, C. A. In the old authorities trespass seems to have

alike, however, it was said that there was a wrong done by direct physical force, therefore a trespass; and as the form of action was the same, it has been sometimes supposed that the principles of liability are also the same, and that a party may be liable without more for the unforeseen consequences of his act, provided they are sufficiently direct. Observations to that effect may be found in the reports, but little authority. Thus it is said, "If a man assault me, and I lift up my staff to defend myself, and in lifting it hit another, an action lies by that person, and yet I did a lawful thing" (a). In *Leame v. Bray* (b) Grose, J., says, "Looking into all the cases from the Year-Book in 21 Hen. VII. down to the latest decision on the subject, I find the principle to be that if the injury be done by the act of the party himself at the time or he be the immediate cause of it though it happen accidentally or by misfortune, yet he is answerable in trespass." The authority referred to in the Year-Book simply amounts to this, that he who shoots and wounds another unintentionally may be liable in trespass, though he commits no felony (c). However, in spite of the

been allowed as a form of action, where the injury was clearly consequential, and was in fact averred with a *per quod*. Thus in *Fitzherbert*, N. B. p. 89, it is said if a man fill a ditch with mud and earth by which another man's land is overflowed he shall have a writ of trespass, "wherewith force and arms he filled a certain ditch . . . inasmuch that the water being hindered of its ancient course overflowed, &c." See, too, *Preston v. Mercer*, (1656) Hardres, 60; *Courtney v. Cullett*, (1698) Lord Raym. 273. In the more recent case of *Gregory v. Pper*, (1829) 9 B. & C. 591, trespass was maintained, where only in a highly artificial sense could it be said that force was directly applied.

(a) *Bessey v. Olliet*, (1683) T. Raym. p. 463.

(b) (1803) 3 East, p. 600.

(c) In another case from the Year-Books (6 Ed. IV. 7, pl. 18) it was said to be a trespass where a man was cutting his hedge and the thorns *se invito* fell on his neighbour's land; but here there was clearly negligence. In *Weaver v.*

Ward, (1616) Hob. 134, the defendant had wounded the plaintiff by a shot and pleaded that it was done *casualiter et per infortunium et contra voluntatem suam*, and the plea was adjudged ill because he ought to have set out the facts specially so that it might appear whether he had been negligent or not. This case appears an authority for the proposition that where the plaintiff proves a *prima facie* case of trespass, the burden of proof is on the defendant to negative both intention and negligence. In *Dickenson v. Watson*, (1682) T. Jones, 205, and *Underwood v. Hewson*, (1724) Stra. 596, which were cases of trespass by gunshot wounds, there was, as far as can be gathered from the meagre reports, evidence of negligence. In *Stanley v. Pocoll*, (1891) 1 Q. B. 86, where the defendant whilst firing at a pheasant accidentally and without negligence wounded the plaintiff with a pellet from his gun, it was held that no action lay. And see the discussion on this subject in *Holmes on the Common Law*, pp. 87 *sqq.*

scantiness of direct authority, the law may be thus summed up (a) :—" As to the cases cited, most of them are really decisions on the form of action whether case or trespass. The result of them is this, and it is intelligible enough ; if the act that does an injury is an act of direct force, *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful (b), or the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful."

The un-
authorised
taking of a
chattel not
always a
trespass.

Conversion of
chattel.

Straying
cattle.

If one man takes the chattel of another without authority, *primâ facie* it is a trespass, but this is not a universally true proposition. "The finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner" (c). So a stranger may in the absence of the executor do what is immediately necessary for the preservation of the goods of a deceased person (d). In these cases, therefore, the question of trespass depends not upon the act, but upon the motive. If the finder deals with the goods with the object of benefiting the owner, he does not commit a trespass, but if not, he does. If a man not merely takes the chattel of another, but also makes use of it in a manner inconsistent with the title of the real owner, he is guilty not merely of a trespass but of a conversion (e), and generally is liable for the total value of the article. Where an act is ambiguous in its nature, it must depend upon the motive of the doer whether it is a trespass or a conversion (f), and the motive again may depend upon his knowledge of the title of the true owner (g).

Although it is customary to speak of an injury done by straying cattle as a trespass, and trespass in such a case was

(a) *Per* Bramwell, B., *Holmes v. Mather*, (1875) L. R. 10 Ex. p. 268.

(b) "Wilful" here clearly means not that it was intended to commit a trespass, but that it was intended to do the very thing which constitutes a trespass.

(c) *Per* Blackburn, J., *Fowler v. Hollins*, (1872) L. R. 7 H. L. p. 766. As to what taking constitutes a trespass, see below, pp. 231-232.

(d) *Kirk v. Gregory*, (1876) 1 Ex. D. 55.

(e) See below, pp. 234-236.

(f) *Fouldes v. Willoughby*, (1841) 8 M. & W. 540.

(g) See *per* Blackburn, J., *Fowler v. Hollins*, (1872) L. R. 7 H. L. pp. 766-7. As to the question of title by mere possession, see *South Staffordshire Water Co. v. Sharman*, (1896) 2 Q. B. 44.

formerly the appropriate form of action, yet the liability does not rest on the mere invasion of right but on the breach of duty. While a man's cattle are on his own land he is bound to insure that they do not stray (a); while they are passing on the high road he is only bound to take care that they do not stray (b).

A trespass to the person of a servant which has the effect of depriving the master of his service is of itself an injury to the master, who is considered to have a property in the person of the servant. Hence, for an assault on the servant he could sue in trespass, though an allegation of *per quod servitium amisit* was also necessary, and the real gist of the action was the consequential injury. But apart from this historical anomaly, an interference with rights of service or rights of contract generally is not actionable unless malicious (c).

Injuries to servants.

An act which amounts to a direct invasion of a definite incorporeal right of property is of itself a tort, just as trespass is in the case of corporeal property. In an action for the disturbance of an easement the sole questions are whether the plaintiff has the right he claims, and whether it has been in fact disturbed by what the defendant has done. So with regard to personal property: a copyright or a patent right confers a monopoly in the sale of a certain article. If the monopoly is infringed the possessor of the right has his action, however innocent the infringement may be. It has been said that a right in a trade mark or trade name is a right of property which will be protected in the same manner as a patent right. This is, however, apparently not absolutely certain (d) although the trend of recent legislation and notably of the Trade Marks Act, 1905, is to affirm the existence of such a right. At common law the ground of action for the infringement of a trade mark or name has always been said to be that the defendant has defrauded the plaintiff by palming off his own goods on the public as those of

Injuries to incorporeal rights.

(a) *Lee v. Riley*, (1865) 18 C. B. S. S. 722.

(b) *Tillet v. Ward*, (1882) 10 Q. B. D. 17.

(c) *Cattle v. Stockton Waterworks Co.*, (1875) L. R. 10 Q. B. 453. The mere fact of interference, however, may raise a presumption of malice.

Glamorgan Coal Co. v. South Wales Miners' Federation, (1903) 2 K. B. 545; affirmed by House of Lords *sub nom. South Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A. C. 239.

(d) See the question discussed, *Singer Machine Manufacturers v. Wilson*, (1876) 3 App. Cas. 376. See Ch. XXI.

the plaintiff. Since, however, trade marks are now regulated by statute and registered, there may be some ground for regarding them as property in the strict sense.

Absolute
duties.

There are many duties which, subject to the exception of the act of God (*a*) and the King's enemies, are unqualified in their nature. Among the most important are those which arise out of the use and enjoyment of land. Here, subject to certain natural rights (*b*) of mining, quarrying, and cultivation, the maxim *sic utere tuo ut alienum non lædas* applies. Nothing must be done on the land to damage those outside it. Whatever the owner brings there he must keep in at his peril (*c*). A riparian proprietor may not bank his land against the flooding of a stream if the effect is to send more water on to his neighbour's (*d*); although where the sea encroaches or there is an inundation of land water, this is a common danger against which everybody may guard without regard to the effect on other proprietors (*e*). If water is on a man's land which he did not bring there, he is not bound to keep it in, but he may not artificially send it away (*f*).

The duty of the occupant of land to keep cattle from straying is unqualified (*g*). So also is the duty to keep animals *feræ naturæ*, or of known vice, from doing harm in accordance with their propensities (*h*). So, if a man light or maintain a fire he must see that it does not send out sparks, or otherwise spread and set light to the property of others (*i*).

Statutory
authority.

Where, however, an express statutory authority is given to make a certain use of property or to do a certain class of acts, such acts or such user, apart from specific legislation, cannot

(*a*) For the explanation of this expression, see Ch. XV.

(*b*) As to distinction between natural and non-natural user, see Ch. XV.

(*c*) See Ch. XV.

(*d*) *Menzies v. Breadalbane*, (1828) 3 Bli. N. R. 414. See below, p. 157.

(*e*) *Nield v. London & North Western R. Co.*, (1874) L. R. 10 Ex. 4; *Rex v. Pagham Commissioners*, (1828) 8 B. & C. 355. But it is unlawful for the owner of land to remove a natural bulwark against the sea, and he may be liable for the damage so caused, not on the

ground that it is a breach of private duty but because it is a breach of public duty causing particular damage (*Attorney-General v. Tomline*, (1879-80) 12 Ch. D. 214; 14 Ch. D. 58).

(*f*) *Whalley v. Lancashire & Yorkshire R. Co.*, (1884) 13 Q. B. D. 131.

(*g*) *Lee v. Riley*, (1865) 18 C. B. N. S. 722.

(*h*) *May v. Burdett*, (1846) 9 Q. B. 101; *Filburn v. People's Palace and Aquarium Co.*, (1890) 25 Q. B. D. 258.

(*i*) *Filliter v. Phippard*, (1847) 11 Q. B. 347.

of themselves constitute a wrong (a). The duty ceases to be unqualified, but there still remains a duty to act with proper care and skill. Thus, if a railway company use engines under statutory authority, and in spite of all precautions sparks escape and cause damage, no action lies (b).

It is, however, provided by the Railway Fires Act, 1905 (c), that "when . . . damage" (not exceeding one hundred pounds) "is caused to agricultural land or to agricultural crops, as in this Act defined, by fire arising from sparks or cinders emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damage."

Statutory authority is, moreover, no defence to an action based on negligence. Where, however, the negligent tort-feasor is a "public authority," the action must be brought within the period limited by statute, or it is altogether barred (d).

2. The word negligence is used in law in a double sense, which may be a source of fallacy. It is sometimes used to express a breach of duty unqualified in its nature, as where we speak of the negligent keeping of fire, the negligent storage of water, or the negligent keeping of a dangerous animal. In these cases the conduct of the defendant may have been perfectly reasonable and careful throughout, and yet he may be liable. But when we speak of negligent driving along a highway, or the negligent use of a gun, we indicate a very different source of liability, arising not from the nature of the thing done, but from the want of proper care and forethought in the doing of it. It is in the latter sense that it is proposed to use the word negligence in the present work (e). "Negligence is an omission to do something

Negligence—
ambiguous
signification.

Definition

(a) *London, Brighton & South Coast R. Co. v. Truman*, (1885) 11 App. Cas. 45. Cp. *Met. Asylum Dis. v. Hill*, (1881) 6 App. Cas. 193.

(b) *Vaughan v. Taff Vale R. Co.*, (1860) 5 H. & N. 679; *Jones v. Festiniog R. Co.* (1868) L. R. 3 Q. B. 733. Cp. *Powell v. Fall*, (1880) 5 Q. B. D. 597.

(c) 5 Ed. VII. c. 11. (THIS ACT COMES INTO OPERATION ON JANUARY 1ST, 1908.)

(d) 36 & 37 Vict. c. 61, and see

Williams v. Mersey Docks and Harbour Board, (1905) 1 K. B. 804, C. A.

(e) There is another fallacy lurking in the use of the word negligence. A mine-owner is not bound in working his mine to take care not to damage his neighbour. If his operations are reasonable and proper in his own interest he is not obliged to take precautions against the natural consequence. It is sometimes, however, said that he is liable if he mines negligently. But negligence

Negligence of omission.

which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do" (a). A mere omission, however, except where some duty of a public nature is imposed by the law, or where the functions of some office have to be discharged, is not actionable. It is not legal negligence to refuse to throw a rope to a drowning man, or to omit to warn a person of an approaching vehicle. An omission is only negligent when coupled with a precedent act out of which a responsibility arises. The reasonableness of any conduct must be considered with reference to the probability not only of its causing damage to others at all, but further of causing damage in a particular way and to a particular person.

Damage must be proximate.

Negligence of infants and imbeciles.

It is not enough to show a negligent act and damage following. The damage must not be too remote; it must not happen in a way that could not reasonably have been anticipated, and it must happen to a person whom the wrong-doer might reasonably have contemplated as likely to be affected by his conduct (b). As the essence of negligence is a lack of reasonableness, it would seem that it can never be imputed to those who in consequence of their tender years or natural imbecility cannot be said to possess reasoning powers (c). This latter proposition must, however, be taken with the qualification that although a person of unsound mind is undoubtedly irresponsible for a tortious act, arising immediately out of, or actually covered by, the mental derangement from which he suffers, it is quite conceivable, nay probable, that a plea of monomania would be no defence to an action against him, when the act complained of could be shown to the satisfaction of the Court to have arisen under circumstances evidencing, on the part of the wrong-doer, a normal appreciation of the necessary consequences of his illegal act.

Negligence depends on general view of circumstances.

In all other cases it is assumed that the party in question possesses average common sense and the ordinary experience of life. But, though no one is excused for not knowing what every

here means omission to mine properly, not omission to take care of his neighbour. See Ch. XV.

(a) *Per* Alderson, B., *Blyth v. Birmingham Waterworks Co.*, (1856) 11

Ex. p. 784.

(b) See Ch. XV.

(c) *Lay v. Midland R. Co.*, (1874-5) 34 L. T. N. S. 30. See below, pp. 46-48.

one ought to know, special knowledge may clearly be a ground of liability. If A. knows a gun to be unsafe and B. does not, it may be very reasonable for B. to deal with it in a manner which on the part of A. would be highly negligent. Reasonableness must have reference to all the surrounding circumstances, and A.'s knowledge is one of those circumstances.

With regard to the use of land, questions of negligence as a rule do not arise between those using the land and those outside it. As between persons so situated the reciprocal rights and duties are usually absolute. A duty to take *some* care exists towards all who come lawfully on the land, whether as guests, servants, bare licensees, or in virtue of some right or interest. The respective duties towards these different classes are elsewhere fully pointed out (a). Apart from the user of land, every act or omission which is in itself negligent, and is a sufficiently proximate cause of damage to the person or corporeal property of another, affords a cause of action (b). But towards a trespasser there is no duty to take care that either the land or the chattel in respect of which the trespass is committed is in a safe condition (c). The duty is not to prepare danger with intent to injure, except for the purpose of reasonable self-protection, and not to do that which the law expressly forbids (d). But, as will be seen, it is no defence, when a man has by a negligent act of commission done damage to another, to say that the party damaged was a trespasser (e).

Negligent
user of land.

In some cases of negligence the immediate cause of the damage complained of is the plaintiff's own act, as for instance, where the defendant negligently puts into his hands a dangerous thing, and he, using it in the way contemplated, is damaged in his person or property. In such a case it is obvious that if he knew of the danger, he is the author of his own wrong; and has suffered not by reason of anything which the defendant did, but by reason of what he did himself. *Volenti non fit injuria* (f). In order

Negligent
misrepresentation.

(a) See Ch. XV.

(b) *Hayn v. Culliford*, (1879) 4 C. P. D. 182. As to the defence of contributory negligence, see Ch. XV.

(c) *Mangan v. Atterton*, (1866) L. R. 1 Ex. 240; *Blyth v. Topham*, (1607) Cro. Jac. 158.

(d) *Bird v. Holbrook*, (1828) 4 Bing. 628. See below, pp. 155-156. *Barnes v. Ward*, (1850) 9 C. B. 392.

(e) *Davies v. Mann*, (1842) 10 M. & W. 546. See Ch. XV.

(f) For the limitations of the maxim, see below, Ch. XV.

therefore to establish a cause of action, he must show that he was in ignorance of the risk, and that for such ignorance the defendant was responsible by reason of representations expressly or impliedly made that the thing might be safely used. The cause of action, therefore, is for a misrepresentation, not necessarily wilfully, but negligently made. So the liability of the possessor of land to those coming upon it by his invitation may be said to depend ultimately upon an implied representation. As a general rule, however, a negligent misrepresentation, although acted upon to the damage of the person to whom it was made, is not ground of action. Though the question was at one time regarded as doubtful, it is now finally settled that in general a misrepresentation is not actionable against the person making it unless it be fraudulent (a); and to this general rule the only exception which the law makes is where the injury suffered by the plaintiff in consequence of the misrepresentation is, as in the cases above referred to, a physical injury (b), although on the other hand an innocent misrepresentation may go so much to the root of the matter as to avoid a right which would otherwise accrue to the person making it (c).

Moral
misconduct.

3. In certain cases the wrongfulness of an act is made to depend upon the existence of an element of moral misconduct. Such moral misconduct may consist either (a) in doing the act from an improper motive, or (b) in the use of improper means to gain the end which the defendant has in view.

Malice.

(a) The technical name usually given to the various motives which the law does not allow is "malice," under which term are included many motives besides that of spite, or a desire to injure the plaintiff. What particular motives the law will consider improper and malicious will vary according to the circumstances. Under some circumstances it will consider a particular motive, such as that of a desire to benefit oneself at another person's expense, as a wrong motive, while under other circumstances it will regard the same motive as innocent (d).

(a) See below, Ch. XVI.

(b) See below, Ch. XVI.

(c) *Seddon v. The North-Eastern Salt Co., Ltd.*, (1905) 1 Ch. 326. *Life and*

Health Insurance Co. v. Fule, (1904) 6 F. 437, Ct. of Sess.

(d) Compare the case of *Boice v. Hall*, (1881) 6 Q. B. D. 333, with *Meggs v.*

In cases in which the respective rights of the plaintiff and defendant conflict, the law will in some cases allow the defendant's right to prevail unconditionally, in others it will only allow him to exercise his right to the plaintiff's detriment subject to the condition of his so exercising it for a particular purpose. In the latter cases, if the defendant acts from any motive other than that of fulfilling the purpose for which the privilege was given him, the law will hold his conduct to be malicious and actionable. The most familiar example of a right given for a special purpose is that of publishing defamatory matter upon a privileged occasion. If A. publishes to C. matter defamatory of B., his act is *prima facie* wrongful. If he does so for the purpose of giving C. some information which it is right that C. should have, he is privileged; but if his communication is made not really for the purpose of giving information to C. but from some side motive, he is not acting under the privilege, and his conduct is actionable. Again, if one man sets the criminal law in motion against another, he is protected against the consequences of so doing, even though he acted without sufficient cause, if his motive was to forward the ends of justice. So, it is a good plea in actions of slander of title, and other actions of the like nature, that the defendant was seeking to protect some interest of his own.

Malice in case of conflicting rights.

Another class of cases in which the existence of a wrong motive is an ingredient of liability, consists of cases in which one person persuades another to commit a breach of his contract with a third. In *Bowen v. Hall* (a), the defendant induced another person to break his contract of exclusive personal service with the plaintiff in order that he might enter the service of the defendant. The latter's conduct was held to be actionable upon the ground that it was done with an improper motive, that of benefiting himself at the expense of the plaintiff. It was there conceded by the Court that "merely to persuade a person to break his contract" without any such improper motive would not be actionable.

Malicious procurement of breach of contract.

As a general rule, however, the law regards the thing done and not the reason why it was done. Thus in the recent case of

Steamship Co. v. McGregor & Co. (1892), A. C. 25. See also *Boots v. Grundy*, (1890) 82 L. T. 769.

was followed in *Temperton v. Russell*, (1893) 1 Q. B. 715. See, too, the earlier case of *Lumley v. Gye*, (1853) 2 E. & B. 216.

(a) (1881) 6 Q. B. D. 333. This case

the *South Wales Miners' Federation v. Glamorgan Coal Co., Ltd.* (a), it was held that the conduct of a person, or combination of persons, in good faith advising others to break their contractual obligations with third parties affords a ground for action, even though the advice be honest, and free from evidence of malicious intentions.

Motive in use
of land

Again, it has been held that in the use which an owner makes of his land his motive is immaterial. In *Simmons v. Lillystone* (b), certain timber of the plaintiff's had become imbedded in the soil of the defendant, who caused a saw-pit to be dug on the spot, and the workmen employed cut the timber. In an action for conversion of the timber the defendant justified the cutting as necessary for making the saw-pit and the beneficial and profitable use of his land. It was left to the jury to say whether the defendant had simply dug a hole in order to have a pretext for cutting the timber, or really and *bonâ fide* had an intention of making a saw-pit. This direction was held wrong because the defendant had a right to make a hole in his ground if he pleased; and neither his intention to use it as a saw-pit, nor his good faith, could be enquired into.

In *Corporation of Bradford v. Pickles* (c) it was held by the House of Lords that a landowner has an absolute right to intercept on his own land underground percolating water and prevent it from reaching the land of his neighbour, even though his motive in so doing be not to benefit himself but to injure his neighbour. "No use of property," said Lord Watson, "which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious" (d). In the earlier case of *Crompton v. Lea* (e) it was alleged in substance that the defendant was proposing to work in such a manner as to let water into the plaintiff's mine, and

(a) (1905) A. C. 239.

(b) (1858) 8 Exch. 431.

(c) (1895) A. C. 587.

(d) *Corporation of Bradford v. Pickles*, at p. 598. In the Roman Law such interception of underground water was held to be actionable if done maliciously. Marcellus scribit cum eo qui in suo fodiens vicini fontem avertit nihil posse

agi nec de dolo actionem; et sane non debere habere si non animo vicino nocendi sed suum agrum meliorem faciendi id fecit (Dig. 29, § 3). But Lord Wensleydale had already in *Chasemore v. Richards*, (1859) 7 H. L. C. p. 387, denied that such a doctrine found any place in our law.

(e) (1874) L. R. 19 Eq. 115.

that the operation could not benefit the plaintiff, and was not for any proper purpose, and it was decided on demurrer that a right to an injunction was shown. But that decision would seem to rest not on any question of motive, but on the fact that the operation in itself was out of the ordinary and regular course of mining.

To the general rule, however, that liability for damage caused by the use of property is independent of motive, it may be that there is an exception in the case of certain classes of nuisance, where the annoyance is caused by something done in the course of the common and ordinary use or occupation of land or houses, so that the plaintiff will probably have occasion to inflict in his turn upon the defendant, at some future date, a similar annoyance to that of which he complains. Of nuisances of this kind the burning of weeds, emptying of cesspools, making noises during repairs to a house, are instances, with reference to which it has been said that they would be actionable if done wantonly or maliciously, though not otherwise (a). And it has accordingly been held that noises, such as that of playing a musical instrument, which are not restrainable as a nuisance in the absence of malice, will be restrained if made maliciously (b). The principle of these cases seems to be, not that the annoyance does not amount to a nuisance in the absence of malice, but that it is a nuisance of a kind which must be put up with. The nuisance being reciprocal in its character must be met with mutual forbearance (c). But it must be regarded as very doubtful whether since the decision in *Corporation of Bradford v. Pickles* that principle can any longer be regarded as good law.

Motive when material in nuisance.

“An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent” (d). There is no such thing as an action for maliciously seizing goods under a distress or execution for rent or for a judgment debt which remains unsatisfied (e). If the seizure is legal there is no cause

Malicious issue of process.

(a) *Per* Bramwell, B., *Bamford v. Turnley*, (1860) 3 B. & S. p. 83; *per* Vaughan Williams, J., *Harrison v. Southwark & Vauxhall Water Co.*, (1891) 2 Ch. p. 414.

(b) *Christie v. Davey*, (1893) 1 Ch. 316.

(c) *Per* Bramwell, B., (1860) 3 B. & S. p. 84.

(d) *Per Cur.*, *Stevenson v. Newnham*, (1853) 13 C. B. p. 297; and see *Crowth v. Ramsbotham*, (1798) 7 T. R. 654.

(e) As to a malicious levy of execution for the whole of a judgment debt

of action at all; if it is illegal the form of action is trespass. In either case the allegation of malice is immaterial. In *Lucas v. Nockells* (a) the plaintiff was a shipowner and the defendants the consignees of the cargo. A dispute having arisen as to the payment of freight, the defendants took out execution on a judgment which they had against the consignor, went on board the plaintiff's vessel with a sheriff's officer and a warrant, forcibly removed the cargo, and afterwards sold it by auction, having made affidavit at the custom house that they landed it as importers. Lord Tenterden left it to the jury to say whether the goods were *bonâ fide* taken under the execution, or whether it was resorted to as a colourable pretext to enable the defendants to get the cargo without paying freight. The jury having found for the plaintiff, the direction was upheld both in the Exchequer Chamber and the House of Lords. It was conceded, however, that if the execution had been regularly carried out to the end, the motives of the defendants could not have been enquired into, and the case must be considered an illustration of the doctrine of trespass *ab initio*. If a man having begun to act under an authority given by the law afterwards departs from it, he is considered as having been wrong throughout. "If a man has done what he is justified in doing and no more, the law in many cases will not permit his motives to be enquired into; as, if he has a right to prosecute for a crime or to arrest for a debt, there can be no enquiry with what motives these acts are done: but if he does more than, as a prosecutor or creditor, he has a right to do, he will not be justified, and it becomes proper to enquire whether the prosecution and arresting were not mere pretences" (b).

In *Oakes v. Wood* (c) the plaintiff had behaved in a disorderly manner in the defendant's public-house, and he had thereupon forcibly ejected her. She brought an action for assault, and the question was discussed but not decided whether it was open to the plaintiff to prove that though it was justifiable to expel her, the defendant had really acted in mere spite and ill-will. Parke, B.,

after a part has been satisfied, see 157.

below, Ch. XIX.; and see *Baker and Wife v. Wicks and Others*, (1904) 1 K. B. 743. (b) *Per* Best, J., (1828) 4 Bing. p. 744.

(c) (1837) 2 M. & W. 791.

(a) (1828-33) 4 Bing. 729; 10 Bing.

said (a), "The whole difficulty arises from the decision in *Lucas v. Nockells*. If it were not for that case I should have no difficulty. I should have thought that if the defendant had a justifiable cause for turning the party out the motive was wholly immaterial; even though he did it in pursuance of an old grudge it made no difference so long as he did no more than was necessary to turn her out."

(b) The second of the two kinds of moral misconduct above mentioned as being material to liability, consists in the use of unfair or improper means to gain a particular end. In certain cases, if one person makes use of either force or fraud to gain a benefit at the expense of another, this conduct will be actionable, though the gaining of the same benefit by other means might be perfectly justifiable. Such impropriety in the means employed is particularly material in the various classes of cases which may be grouped under the head of "competition."

Impropriety
of means to
end.

No one has a vested right in the carrying on of any trade, profession, or calling, or in the acquisition or disposal of property. We must all take our chance of the intentional competition of others. But every man has a right to a fair chance, and if force or fraud is employed to seduce or deter those who would otherwise have had dealings with him (b) or given him employment the right is invaded (c). "When a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases. . . . One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. The action there was held not to lie. But suppose Mr. Hickerlingill should lie in the way with his guns and frighten the boys from going to school and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars" (d). Accordingly, where the captain of a trading vessel on the coast of

Unfair com-
petition.

(a) p. 794. He had dissented in *Lucas v. Nockells*.

(b) The rule laid down in *Trego v. Hunt*, (1896) A. C. 7, that the vendor of the goodwill of a business may not sedit any person, who was a customer of the old business prior to the sale, to continue to deal with the vendor, or not to deal with the purchaser, is of univer-

sal application: *Curl Bros., Ltd. v. Webster*, (1904) 1 Ch. 685.

(c) "What is the definition of a 'fair competition'? What is unfair that is neither forcible nor fraudulent?" *per* Lord Bramwell, (1892) A. C. p. 47.

(d) *Per* Lord Holt, C.J., *Keble v. Hickerlingill*, (1705) 11 East, p. 573 (n. .

Africa fired guns to frighten the natives from resorting to a rival ship, it was held that an action lay (a). So it is actionable if an omnibus proprietor, with the view of preventing his rival from having a fair chance of attracting customers to his omnibuses, habitually places his own omnibuses so close behind those of his rival that the doors of the latter are unable to be opened and the access of the passengers thereto is forcibly obstructed (b).

Just as a trader has no vested right in the customers who resort to his shop, so a landowner has no absolute right in the game that resorts to his land. But the law will afford the same protection in the one case that it does in the other. It will not allow other persons to employ forcible means to scare away the game from the plaintiff's land or prevent it resorting there. Thus, a person is not justified in firing guns or exploding rockets in the immediate neighbourhood of the plaintiff's decoy pond or grouse-moor with the object of frightening the ducks or game from off the plaintiff's land on to his own land in order that he may have an opportunity of shooting them there (c). In *Young v. Hichens* (d) the plaintiff had partially enclosed in a sein net a large number of fish in the sea, the opening between the end of the net being about seven fathoms, which he was about to close with a stop net, when the defendant rowed up to the opening and disturbed the fish and prevented their capture. The plaintiff brought trespass. It was held the plaintiff could not recover in that form of action, not having sufficiently reduced the fish into possession. Had he sued in case for disturbance there would seem to have been sufficient use of force to have supported the action.

In all these cases, however, if, as is almost invariably the case, the defendant's motive be to benefit himself and not to injure the plaintiff, it is the use of the improper means for gaining his object that alone makes the damage to the plaintiff actionable.

Fair competition.

The defendant's conduct in such cases is sometimes said to be malicious, but the use of the term "malice" in that context

(a) *Tarleton v. Macgawley*, (1793) Peake, 205. See, too, *Garrett v. Taylor*, (1620) Cro. Jac. 567.

(b) *Green v. London General Omnibus Co.*, (1859) 7 C. B. N. S. 29.

(c) *Keble v. Hickeringill*, (1705) 11 East, 573 (n.), 11 Mod. 74, 131; *Carrington v. Taylor*, (1809) 11 East, 571; *Ibbotson v. Peat*, (1865) 3 H. & C. 644.

(d) (1844) 6 Q. B. 606.

can only create confusion (a). If with the same motive, that of benefiting himself at the plaintiff's expense, he had produced precisely the same damage by other means not involving the use of force or fraud, the plaintiff would have had no ground of complaint (b). Thus the setting up of a rival shop or school with the express object of enticing the plaintiff's customers or scholars away is no ground of action, nor is the making of a rival decoy for the purpose of attracting away the plaintiff's ducks (c). This difference in the legal consequences of the different means employed to produce the same result is well illustrated by *Ibbotson v. Peat* (d), where to a declaration for frightening grouse off the plaintiff's land by exploding rockets, the defendant pleaded that the grouse in question were birds which the plaintiff had himself enticed from off the defendant's land by means of corn placed upon his own, and that the acts complained of were merely done for the purpose of recovering the birds. On demurrer the plea was held bad. But, though it was unnecessary to decide the point, Bramwell, B., expressed a strong opinion that the means resorted to by the plaintiff to entice the defendant's game away were not unlawful. "There is nothing," he said, "in point of law to prevent the plaintiff from doing that which the plea alleges he has done. It cannot be contended for a moment that any action would lie against the plaintiff. . . . Where a person's game is attracted from his land he ought to offer them stronger inducements to return to it" (e). One fisherman cannot complain if he is frustrated in his expectation of a catch of fish by the anticipation of another (f), though it would be otherwise if force were used. One trader may lawfully undersell another with the intention of driving him out of the trade and securing a monopoly for himself. And

(a) The term "malice" is also sometimes used in a highly artificial sense in connection with the subject of libel. If a newspaper editor publishes in his paper a letter which he has neglected to read before sending to press, and it turns out to be defamatory, he is liable, and his act in publishing it is said to be malicious; though it is obvious that his mind was purely negative as to motive,

the publication having been the result of mere inadvertence.

(b) *Boots v. Grundy*, (1900) 82 L. T. 769.

(c) *Per* Holt, C.J., (1705) 11 East, 573 (n.); Year-Book, 11 Hen. IV. 47.

(d) (1865) 3 H. & C. 644.

(e) p. 650.

(f) *Sterens v. Jeacocke*, (1848) 11 Q. B. 731.

equally may a number of traders combine to produce a similar result by similar peaceable means. In *Mogul Steamship Co. v. McGregor, Gow & Co.* (a), the defendants were a so-called "conference" of shipowners. They traded to certain ports and acted on a common system of rules for the regulation of freights with the object of keeping the trade of the ports in their own hands. The plaintiffs traded to the same ports independently. The defendants systematically underbid them, and used pressure to prevent shippers giving them cargoes, with the direct object of driving them out of the trade. The plaintiffs in consequence lost business. It was held by the House of Lords that as the acts of the defendants had been done with the lawful object of protecting their own trade, and as they had not employed any unlawful means or been actuated by motives of spite towards the plaintiffs, the plaintiffs had no cause of action. The case was merely an instance of the ordinary expedient of commercial men "of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future" (b). But where the combination of parties for the attainment of a particular end, in itself not illegal, is clearly antagonistic to the existing legal right of a third person, to whom one of the parties combining is under a contractual obligation, the interests of the combination must not clash with the existing legal right of the individual; and in the event of a breach of such right, the aggrieved person is entitled to damages. Thus, it has been held that the existence of an agreement between an employer of labour and a trade union, to obey the union rules, is no justification, in an action by a workman against the union, for the latter calling out the employer's

(a) (1892) A. C. 25.

(b) *Per* Bowen, L.J., in the Court of Appeal, 23 Q. B. D. p. 615. It will be observed that in this case the very same motive which in *Bowen v. Hall* (see above, p. 17) was held to be malicious and actionable, namely, a desire on the part of the defendant to benefit himself at the plaintiff's expense, was held to be non-malicious and innocent. The difference between the two cases lies in

the difference of the circumstances. In the former, the defendant interfered with the performance of an existing contract, the right to have which performed may be regarded as an absolute right of property. In the latter the defendant only interfered with the plaintiff's chance of making beneficial contracts in the future. (But see the next cases.)

workmen, in consequence of a breach by the employer of the union rules (a).

In *Temperton v. Russell* (b), the defendants, members of a joint committee of certain trade unions connected with the building trade, being desirous of securing that a certain firm of builders should obey the rules of the unions, requested the plaintiff to cease from supplying materials to the firm until the rules were obeyed. The plaintiff refused to do so, whereupon the defendants, in order to compel the plaintiff to comply with their request, persuaded third persons to break certain contracts into which they had already entered with the plaintiff, and also to abstain from entering into any further contracts with him, whereby he suffered damage. The Court of Appeal held that the defendants were liable both for procuring such breaches of contract, and also for conspiring to prevent persons from entering into future contracts with the plaintiff. But it seems difficult, so far as the latter head of that decision is concerned, to distinguish that case from *Mogul Steamship Co. v. McGregor, Gow & Co.* (c), for the object of the defendants was not to injure the plaintiff as an end in itself, but only to put pressure upon him in order to secure a lawful benefit for themselves, nor did they make use of any force or fraud. The correctness of that decision may therefore be open to question. It was followed by the Court of Appeal in *Flood v. Jackson* (d), the decision, however, being subsequently reversed by the House of Lords. In this case the (e) plaintiffs were journeymen shipwrights employed by the day by a firm of ship repairers. The defendants, who were respectively the chairman, secretary, and district delegate of a trade union, the rules of which the plaintiffs were alleged to have broken, were charged with having maliciously procured the plaintiffs' said employers to abstain from employing them in the future. The jury, in the Court of First Instance, found a verdict in favour of the first two defendants and against the third. In spite of this verdict it was, nevertheless, held by a majority of the House of Lords that the district delegate had violated no legal right of the respondents,

(a) *Read v. Friendly Society of Operative Stonemasons of England, Ireland, and Wales*, (1902) 2 K. B. 732.

(b) (1893) 1 Q. B. 715.

(c) (1892) A. C. 25.

(d) (1895) 2 Q. B. 21.

(e) S. C. *sub nom. Allen v. Flood*, (1898) A. C. 1.

however malicious and bad his ulterior motives might be, and consequently that he was entitled to judgment. It should, however, always be remembered that the adoption of intimidation, or other violent methods, for the attainment of an ulterior end, not in itself illegal, is an offence at common law (a).

Personal
spite.

In *Mogul Steamship Co. v. McGregor, Gow & Co.*, the defendants' motive was to benefit themselves, and not to injure the plaintiffs except incidentally and as a means to that end, and such a motive as between trade competitors was there held to be a perfectly innocent motive. All the Lords, however, were careful to point out that the defendants had not been actuated by malice in the popular sense of the term, thereby suggesting that if they had been so, they would have been liable, notwithstanding that they made use of neither force nor fraud to secure their object. The use of unfair means is material only where the defendants' motive is innocent. The defendants in that case were a combination of persons, and not an individual, and it may be that the majority of the Lords, when making that suggestion, intended it to be understood as applicable only to a case similar to that before them, namely, one in which the damage is caused by several persons acting in concert. Indeed, Lord Halsbury there conceded that "there are many things which might be perfectly lawfully done by an individual which when done by a number of persons become unlawful" (b), and expressed an opinion that a combination to insult and annoy a person would be an indictable conspiracy. And Lord Bramwell, who took the same view, explained it by saying that "a man may encounter the acts of a single person, yet not be fairly matched against several" (c).

Conspiracy.

But as to whether an action will lie against several conspirators for an act done by them in concert, which would not be actionable if done by one alone, there does not appear to be any express authority to show. The case of *Gregory v. Duke of Brunswick* (d), indeed, appears to have been sometimes regarded as suggesting that such an action will lie. But there the question did not

(a) *Lyons & Sons v. Wilkins*, (1896) 1 Ch. 811, C. A. ; S. C (1899) 1 Ch. 255 ; and see *Charnock v. Court*, (1899) 2 Ch. 35 ; *Walters v. Green*, (1899) 2 Ch. 696.

(b) (1895) 2 Q. B. p. 38.

(c) p. 45.

(d) (1843) 6 M. & G. 953.

arise. In that case the defendants conspired to injure the plaintiff as an actor, and hired other persons to join with them in hissing him, and in pursuance of such conspiracy they hissed him off the stage. Tindal, C.J., directed the jury that if the conspiracy was proved the defendants were liable. But as Coltman J., when subsequently delivering the judgment of the Court, pointed out, the conspiracy there was only material as evidence of malice (a). For it is actionable slander in an individual to hiss an actor maliciously, no criticism being justifiable unless honest. The difficulty in the way of holding an individual liable to an action in such a case is that, in the absence of proof of conspiracy (b), it is very difficult to prove that he acted from a wrong motive.

On the other hand, Lord Field, in *Mogul Steamship Co. v. McGregor, Gow & Co.* (c), quoted with approval Lord Holt's *dictum* that "where a malicious act is done to a man's occupation . . . there an action lies in all cases" (d), and he suggested that the acts of the defendants in the case before him would, if done maliciously in the popular sense of the term, have equally been actionable if done by an individual. In *Flood v. Jackson* (e) the motive of the defendant appeared to have been spite, a desire to punish the plaintiff for past conduct, and upon that ground, if Lord Field's view is correct, the case might perhaps have been supported. But, as above stated, the Court did not go upon that ground, they drew no distinction between the motive of a desire to benefit oneself at another's expense, and that of a desire to cause injury to another as an end in itself. In the more recent case of *Quinn v. Leathem* (f) it was held that although "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent"; nevertheless,

(a) *Ibid.*, p. 959. The decision on the sufficiency of the pleadings in that case ((1843) 6 M. & G. 205) merely came to this, that in an action for conspiracy a plea justifying one of the overt acts, leaving the others unanswered, is bad. It did not decide that a justification of all the overt acts would not have been a good answer to the conspiracy.

(b) In an action for conspiracy,

especially if it be for fraudulent misrepresentation, a plaintiff is entitled to full discovery by the defendants (*Boulton and Others v. Houlder Bros. & Co.*, (1904) 1 K. B. 784, C. A.).

(c) (1892) A. C. p. 51.

(d) *Keble v. Hickeringill*, (1705) 11 East, p. 573 (n.).

(e) (1895) 2 Q. B. 21.

(f) (1901) A. C. 495 (Ire.).

“a conspiracy to injure, resulting in damage,” does give rise to a civil liability, when the purpose of the combination was “to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing its own interests” (a); the ground of the decision apparently being that a conspiracy to injure, apart from the motive of personal aggrandisement, raises a presumption of actionable malice against the conspirators.

Fraud.

There are a variety of cases in which the gist of the action lies in an intent to defraud. In any action founded on a misrepresentation made by the defendant to the plaintiff, which the latter is intended to act upon, and does act upon to his damage, it is essential to show that the misrepresentation was fraudulently made. As above pointed out, if one person fraudulently misleads others into a belief of facts contrary to the truth, with the object of inducing such persons to withdraw their custom from the plaintiff, who suffers damage in consequence, the plaintiff will have a cause of action. It is actionable to sell goods on a market day just outside the limits of the market with the object of defrauding the lord of the market of his toll (b).

Infringement
of public
right.

An infringement of a right which exists for the benefit of the community generally is the subject not of an action but of an indictment (c). But if out of the public injury some particular damage to an individual flows, this is a private wrong, and the party aggrieved may sue. The common application of this principle takes place where some person suffers a damage peculiar to himself, by reason of an obstruction or other nuisance to a highway. Mere delay and inconvenience is not a particular damage, for that is shared with all those who use the highway. The plaintiff must prove that his person or property were injured, or that he was put to some expense (d). Mere loss of custom by

Obstruction
of highway.

(a) *Stevenson v. Newnham*, (1853) 13 C. B. 285, at p. 297.

(b) Fraud need not, however, be proved in order to support an action for disturbance of market (*Wilcox v. Steel*, (1904) 1 Ch. 212, C. A.).

(c) An information for an offence under sect. 60 (587) of the Metropolitan Police Act, 1839, may be laid by an inspector of streets as agent for and on

behalf of a Borough Council, *Allman v. Hardcastle*, (1904) 89 L. T. 553.

(d) *Winterbottom v. Lord Derby*, (1867) L. R. 2 Ex. 316; *Benjamin v. Storr*, (1874) L. R. 9 C. P. 400; as to what causes an obstruction, in respect of which action will lie, see *Dunn v. Holt*, (1904) 73 L. J. K. B. 341; *Winterbottom v. London Joint Stock Bank*, (1903) 88 L. T. 803.

reason of an obstruction does not under ordinary circumstances afford a cause of action (a).

It is a public wrong for a landowner to cut away his own soil and so let in the incursions of the sea, for this is a matter which concerns the general welfare of the realm; and if by so doing he floods any adjacent lands he is liable to the owner for the damage (b).

The public duties which everybody owes are generally negative in their character; they consist simply in abstaining from the violation of some prohibition. But there are many cases in which the duty is imposed on individuals and classes of doing something for the benefit of the public at large. And here, too, the same rule applies that an action lies for private damage flowing out of a breach of public duty (c). Such duties are owed by public officers, and by the undertakers of works intended for the benefit and use of the public at large, such as docks, canals and railways. Landowners may by the express terms of a Crown grant or by prescription be bound to repair a highway or a sea wall (d). Any one who holds himself out as a common carrier owes the duty of carrying on reasonable terms for any member of the public, who is willing to pay the proper charge (e), all goods which he has convenience for carrying, and in respect of which he holds himself out as a carrier (f). Innkeepers owe an analogous duty to receive and accommodate guests (g). There are besides a variety of cases in which the owners of ships, mines, machinery, and other property have statutory duties imposed on them for the sake of public safety and convenience.

Positive
public duties.

(a) *Ricket v. Metropolitan R. Co.*, (1864-7) L. R. 2 H. L. 175.

(b) *Attorney-General v. Tomline*, (1879-80) 12 Ch. D. 214; 14 Ch. D. 58.

(c) *Ferguson v. Kinnoul*, (1842) 9 Cl. & F. 251; *Forbes v. Lee Conservancy Board*, (1879) 4 Ex. D. 116.

(d) *Henly v. Mayor of Lyme Regis*, (1834) 5 Bing. 91; 3 B. & Ad. 77.

(e) The expression generally used is, that the proper charge must be tendered. A formal tender, however, in the strict sense is not necessary, *Pickford v. Grand Junction R. Co.*, (1841) 8 M. & W. 372;

see, however, *Fell v. Knight*, (1841) 8 M. & W. 269.

(f) *Pickford v. Grand Junction R. Co.*, *supra*; *Garton v. Bristol & Exeter R. Co.*, (1861) 1 B. & S. 112; *Johnson v. Midland R. Co.*, (1849) 4 Ex. 367.

(g) *Fell v. Knight*, *supra*; see *Thompson v. Lacy*, (1820) 3 B. & Ald. 283. The obligation to receive guests, is confined to travellers. Innkeepers are not bound to entertain guests permanently, *Lamond v. Richards*, (1897) 1 Q. B. 541.

Special damage from breach of public duty not always a cause of action.

It is not, however, in every case that a party is entitled to maintain an action by reason of his having suffered some particular damage from which the due fulfilment of some public duty would have saved him. It must further appear that his damage was within the mischief against which the law intended to provide. In *Gorris v. Scott* (a) the defendant had carried on his vessel certain sheep for the plaintiff and had omitted to pen them in accordance with the regulations made under the Contagious Diseases (Animals) Act of 1869. The sheep were washed overboard, which would not have been the case had they been penned as required by the Act. It was held, however, that the owner could not recover, because the object of the regulations was to prevent contagion and not to provide for safe carriage. So, if infected animals are exposed for sale in a market contrary to law, whatever other remedy a purchaser from whom their state is concealed may have, he cannot sue as for damage sustained by the breach of public duty, since the object of the law is to check the spread of contagion and not to protect individual purchasers (b).

Even, however, where a party has suffered the very damage against which some statutory obligation is provided as a safeguard, he will not necessarily have any right of action. The whole language and scope of the statute must be carefully considered in order to discover whether it was the intention of the Legislature to give by implication such a remedy (c). But the general rule would seem to be that where a statute imposes a penalty for the breach of the duty which it creates there is no right of action. The presumption is that the Legislature considered the penalty sufficient protection (d). In such and cognate cases, the question whether an action will lie for breach of a statutory duty probably depends mainly upon the nature of the injury likely to arise from a breach, and the amount and allocation of the penalty imposed. "If it be found that the remedy

(a) (1874) L. R. 9 Ex. 125.

(b) *Ward v. Hobbs*, (1877) 3 Q. B. D. 150 ; 4 App. Cas. 13.

(c) See *Atkinson v. Newcastle Waterworks Co.*, (1877) 2 Ex. D. 441, in which the earlier decision of *Couch v. Steel*, (1854) 3 E. & B. 402, was called in

question. See, too, *Vallance v. Falle*, (1884) 13 Q. B. D. 109.

(d) See *Institute of Patent Agents v. Lockwood*, (1894) A. C. 347 ; and per Lord Hobhouse, *Municipality of Picton v. Geldert*, (1893) A. C. p. 525.

provided by statute is to enure for the benefit of the person injured by the breach of the statutory duty, that is an additional matter which ought to be taken into consideration." But, "although it may be a cogent and weighty consideration, other matters have also to be considered" (a).

It is necessary to distinguish between mere breaches of duty and wrongful acts done in the supposed execution of a duty. If, for instance, a sheriff, in order to execute a writ goes where he has no right to go, he is liable, not because he has omitted to do his duty, but because he has committed a trespass, and it will be immaterial whether he has caused damage or not. It is further to be observed that out of a public duty a private duty may arise for the breach of which an action will lie without proof of damage. Thus it has been held that a sheriff might be sued by an execution creditor where he had permitted the debtor arrested on final process to be a short time out of custody, for that it was the right of the creditor to have his debtor constantly detained, and the infringement of this right was a good cause of action without damage (b).

Torts in the course of executing public duty.

Private duty arising out of public duty.

A subordinate public official owes his duty to the public whose servant he is, not to his official superior, and for a breach of that duty an action may lie against him but will not lie against the superior (c). On the other hand, where a person charged with a public duty employs for the purpose of discharging it his own servant he will be answerable for the acts and omissions of the servant (d) just as any other master, while the servant owing no duty to the public cannot be charged for any mere omission, though of course he is answerable for positive wrong-doing.

Public officers.

Nor does the protection given by the Public Authorities Protection Act, 1893, extend to an independent contractor doing under

(a) *Groves v. Wimborne* (Lord), (1898) 2 Q. B. 402, Vaughan Williams, L.J., at p. 416.

(b) *Clifton v. Hooper*, (1844) 6 Q. B. 468; see below, p. 134.

(c) *Lane v. Cotton*, (1701) 12 Mod. 472; *Whitfield v. Lord Le Despencer*, (1778) 2 Cowp. 754; *Barry v. Arnaud*, (1839) 10 A. & E. 646; see below, p. 41.

(d) *Mersey Docks Trustees v. Gibbs*,

(1864-5) L. R. 1 H. L. 93. Previously to this case, the general current of authority was to the effect that persons charged with public duties which must needs be performed through the agency of others were only bound to take due care in the choice of their agents. See *Sutton v. Clarke*, (1815) 6 Taunt. 29. Note in this connection the Public Authorities Protection Act, 1893.

contract, and for his own profit, work which a public authority has been authorised to do (a).

Non-repair
of highways.

Of the duties imposed on public bodies, one of the most important is that connected with the repair of highways. By the common law the duty of keeping highways in proper repair rested in general upon the inhabitants of the parish in which they were situate; the exception being where that duty lay upon the adjoining landowner *ratione tenuræ*. It has been settled law from very early times that the duty of the parish to repair the highways was one for the breach of which the only remedy was by criminal proceedings, by presentment, or at a more modern date by indictment. No action could be maintained against the parish for personal injuries or other special damage suffered by a member of the public in consequence of the defective condition of a highway. And the same exemption from liability to action applied to the inhabitants of a county in respect of the non-repair of county bridges.

It has, however, been held that the rule laid down by the Statute of Bridges (b), which provides that the persons liable to repair a bridge are also liable to repair the highway at each end of the bridge for a distance of 300 feet, applies where a bridge is repairable by the county.

Where, however, the original liability to repair the bridge is imposed specifically by a later statute, apart from express obligation in such statute, there is no responsibility to repair the highway at either end (c).

For this absence of remedy by action two different reasons have been given at different times, neither of which seems to have been wholly satisfactory. In early times the reason given was that as the neglect to repair was an offence against the public at large, all proceedings ought to be taken on behalf of the whole public by means of presentment at the court leet, and not by each individual who happened to be damaged. In the Year-Book, 5 Edw. IV. p. 2, pl. 24, it is said, "If there be a common way, and it be not repaired, so that I am damaged by the mireing

(a) *T. Tilling, Ltd. v. Dick, Kerr & Co., Ltd.*, (1905) 1 K. B. 562.

(b) 22 Hen. VIII. c. 5.

(c) *Hertfordshire County Council v. The Governors and Company of the New River*, (1904) 2 Ch. 513.

of my horse, I shall not have any action against him who ought to repair the way, mes ceo est action populer (a), en quel case nul home singuler avera action de case, mes ceo est action per voy de presentment." In other words, the reason why the action would not lie at that day (A.D. 1466) was to be found in the necessity of avoiding a multiplicity of actions.

If indeed that were the only reason, it would be wholly insufficient, for a nuisance to a highway by an act of misfeasance, as by digging a trench across it, was equally an offence against the public at large, and was equally matter for presentment, and yet there is no doubt that for such a misfeasance a civil action lies at the suit of any individual who suffers special damage from it. But the answer is, that at that day the modern doctrine of special damage—namely, that the existence of a common law duty towards the public at large gives rise to a private duty towards individuals not to inflict on them by a breach of the public duty some peculiar damage over and above that suffered by the rest of the public—was practically unknown (b).

(a) This phrase "action populer" is not here used in its usual signification of a penal action by a common informer (see Brooke, Abr. tit. "Action populer"), but in the wider sense that the matter of complaint is common to the whole public. It may be observed that Brooke's note of this case in Br. Abr. tit. Action sur le case, 93, in which he uses the words "car est popul," has been repeatedly misconstrued to mean, that the reason for the action not lying was that the public (*populus*) were liable to repair; e.g., in the argument of Mr. Chambre and judgment of Ashhurst, J., in *Russell v. Men of Deron*, (1788) 2 T. R. 667; per Alderson, B., arg. in *McEwan v. Penon*, (1853) 8 Ex. at p. 321; and in the judgment of Hannen, J., in *Gibson v. Mayor of Preston*, (1870) L. R. 5 Q. B. at p. 222; and of Lord Halsbury, in *Cowley v. Newmarket Local Board*, (1892) A. C. at p. 350. The origin of this mis-translation is traceable to Viner, who, in his *Abridgment*, tit. "Chimin Common," D. 2, copied Brooke, and instead of verifying Brooke's reference to the Year Book,

guessed wrongly at the omitted letters in the abbreviation "popul." See the argument in *Rundle v. Hearle*, (1898) 2 Q. B. 83.

(b) The earliest trace of such a doctrine appears to be in a judgment of Fitzherbert, J., in the Year Book, 27 Hen. VIII. p. 27, in the course of which he says that, "if one make a ditch across a highway, and I come riding along the way in the night, and I and my horse get into the ditch whereby I suffer great damage . . . I shall have an action against him who made the ditch across the way because I am more damaged by it than any other person." The action there was for stopping a highway whereby the plaintiff was prevented from getting from his house to his close. Fitzherbert, J., held the action lay. But Baldwin, C.J., held that it did not; he did not go on the ground that there was not sufficient special damage, but on the broad ground that under no circumstances would a civil action lie for a public nuisance. In Co. Litt. 1, s. 68, Coke states the law in accordance with Fitzherbert's view,

Later on the reason given was, that "because a foundrous way, a decayed bridge, or the like, are commonly to be repaired by some township, vill, hamlet, or a county, who are not corporate, therefore no action lies against them for a particular damage" (a). And this was the ground upon which it was decided in *Russell v. Men of Devon* (b) that no action will lie against the inhabitants of a county for an injury sustained in consequence of the non-repair of a county bridge. This reason also seems to be insufficient, for if the fact of the parish or county being an undefined body was no objection to its being indicted and fined, it is difficult to see why it should be any objection to its being sued for damages. But, whatever the reason of the rule may have been, the rule itself became firmly ingrained in the law, so much so, indeed, that it was unaffected on the one hand by the introduction of the general doctrine that special damage resulting from a public nuisance is cause of action, and on the other by the transfer by statute of the liability to repair to individuals or corporations, and the consequent removal of the objection that an undefined body could not be sued. Thus it has been held that no action for damage caused by non-repair lay against a surveyor of highways appointed under the Highways Act, 1835 (c), or a county surveyor under 43 Geo. III. c. 59 (d), or a vestry under the Metropolis Management Acts (e), or a local board under the Public Health Acts (f), although in all these cases the obligation to repair was imposed by statute on the parties sued. And the same principle applies to the county, urban district, and rural district councils, to whom the duty of repairing the various roads throughout the country has now been transferred. In the absence

and says that it was so resolved in the King's Bench; he does not give the name of the case, although he cites 27 Hen. VIII. 27 in the margin, but he was evidently referring, not to Fitzherbert's judgment in that case, but to a case recently decided, as he mentions the fact that in that case reference was made to a case of *Westbury v. Powell*, of which no mention is to be found in 27 Hen. VIII. 27. The doctrine of special damage was probably only newly established in Coke's day.

(a) *Thomas v. Sorrell*, (1674) Vaugh.

at p. 340.

(b) (1788) 2 T. R. 667.

(c) *Young v. Davis*, (1862) 7 H. & N. 760.

(d) *M'Kinnon v. Penson*, (1853) 8 Ex. 319.

(e) *Parsons v. St. Matthew, Bethnal Green*, (1867) L. R. 3 C. P. 56.

(f) *Gibson v. Mayor of Preston*, (1870) L. R. 5 Q. B. 218; *Cowley v. Newmarket Local Board*, (1892) A. C. 345; see, too, *Municipal Council of Sydney v. Bourke*, (1895) A. C. 433.

of a clearly expressed intention to the contrary, it must be presumed that the Legislature meant to confer no wider remedy against the new highway authorities than existed against their predecessors. Nor will the Court prescribe what particular works or repairs are necessary for the maintenance of roads, or issue a *mandamus* against a local authority to do any particular works (a). "It must now be taken as settled law, that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance (b). In order to establish such liability, it must be shown that the Legislature has used language indicating an intention that the liability shall be imposed" (c).

And it is apprehended that the same principle equally applies to the case of an individual liable to repair *ratione tenuræ* (d). That liability was in its origin presumably transferred from the parish, and it is to be presumed that the Crown in granting the land to be held on the conditions of that transfer intended to give no wider remedy against the grantee than theretofore existed against the parish. No case is to be found in the books in which an action for non-repair has been held to lie against one liable to repair *ratione tenuræ*. The case in the Year Book above referred to (5 Edw. IV. p. 2, pl. 24) is a direct authority that such an action will not lie. And Martin, B., in *Young v. Davis* (e), and Lord Russell, C.J., in *Rundle v. Hearle* (f), though leaving the point open, expressed a strong opinion against the maintenance of the action.

But for misfeasance, as opposed to mere non-feasance or neglect to repair, the highway authority is liable to an action. Thus where a heap of stones or rubbish had been placed by the wayside for the purpose of mending the road, and had been left at night without any precautions, a plaintiff who drove against the obstruction and suffered damage was held entitled to recover

Misfeasance
in manage-
ment of
highways.

(a) *Att.-Gen. v. Staffordshire County Council*, (1905) 1 Ch. 336.

(b) *Maguire v. Corporation of Liverpool*, (1905) 1 K. B. 767, C. A.

(c) *Municipality of Pictou v. Geldert*, (1893) A. C. at p. 527.

(d) As to liability *ratione tenuræ* for repair of bridges, see *Hertfordshire County Council v. New River Co.*, (1904) 2 Ch. 513.

(e) (1862) 7 H. & N. 760, at p. 772.

(f) (1898) 2 Q. B. 83, at p. 88.

against the highway authority (*a*). And for the purposes of this distinction between misfeasance and non-feasance the neglect of the local authority to repair a permanent artificial structure belonging to them under or upon the highway, such as a barrel drain (*b*), or a sewer grating (*c*), which by reason of such non-repair becomes dangerous, will be treated as a misfeasance; and this whether they created the artificial structure themselves (*d*), or whether it became vested in them by transfer from another body (*e*).

Repair of
public
bridges.

As stated above, the liability of the county council in respect of the bridges which they are bound to repair, stands upon the same footing as the liability of the highway authority to repair the highways; damage resulting from mere non-repair of a bridge does not, however, give any cause of action (*f*).

Neglect to
provide
sewers.

Neglect by a local authority to make the necessary sewers which, by the provisions of the Public Health Act, they are under a duty to provide, does not give rise to a cause of action, even though followed by special damage (*g*); the only remedy is complaint to the Local Government Board (*h*).

Public duties
at common
law—extent
of liability.

The general rule of liability in the case of public duties imposed by the common law is that the party is liable to fulfil the duty in all events save only where he is prevented by the act of God or the king's enemies. Such is the liability of a common carrier or an innkeeper (*i*). The rule, however, is not universal. Thus a sheriff is bound absolutely to keep a prisoner in safe

(*a*) *Mayor and Corporation of Shore-ditch v. Bull*, (1904) 90 L. T. 210, H. L.; *Foreman v. Mayor of Canterbury*, (1871) L. R. 6 Q. B. 214; see also *Smith v. West Derby Local Board*, (1878) 3 C. P. D. 423.

(*b*) *Borough of Bathurst v. Macpherson*, (1879) 4 A. C. 256, P. C., as explained in *Municipal Council of Sydney v. Bourke*, (1895) A. C. 433, P. C.

(*c*) *White v. Hindley Local Board*, (1875) L. R. 10 Q. B. 219.

(*d*) *Borough of Bathurst v. Macpherson*, *supra*.

(*e*) *White v. Hindley Local Board*, *supra*.

(*f*) *Russell v. Men of Devon*, (1788) 2 T. R. 667.

(*g*) As to the extent to which neighbouring authorities may be called upon to contribute to the cost of repairs, upon the ground that they are "adjacent to" and consequently interested in such repairs, see *Mayor and Councillors of the City of Wellington v. Mayor and Councillors of the Borough of Lower Hutt*, (1904) A. C. 773.

(*h*) *Robinson v. Corporation of Workington*, (1897) 1 Q. B. 619, C. A.; *Peebles v. Oswaldtwistle Urban Council*, (1897) 1 Q. B. 625, C. A.

(*i*) *Forward v. Pittard*, (1785) 1 T. R. 27.

custody, subject only to the exception mentioned (a); but in most cases want of care or energy must be proved against him. If there is an unnecessary delay in the execution of a *fi. fa.* and the process is thereby rendered abortive, it is still a question for the jury whether this amounts to negligence (b).

He who has a franchise of a market, is under a liability towards those who use the market to take reasonable care that the premises are in a safe condition (c).

The extent of a statutory liability must of course in each case depend upon the scope and intention of the particular statute in question. The liability imposed may be absolute and subject to no exception whatever. "If an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God. There is nothing impossible in that which on such an hypothesis he . . . is by the statute ordered to do, namely, to be liable for the damages" (d).

Liability
when duty
arises out of
statute.

Where, without any consideration in return, a public duty is imposed by statute, the presumption is that the person owing the duty is only liable in case of negligence. "It would seem to me," says Brett, J., "to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care or skill could obviate. The duty may notwithstanding be absolute; but if so it ought to be imposed in the clearest possible terms. The intention of the Legislature is to be gathered from the language used and the subject-matter. Where the language used is consistent with either view it ought not to be so construed as to inflict a liability unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the

(a) Buller, N. P. p. 63.

(b) *Hobson v. Thellusson*, (1867) L. R. 2 Q. B. 642.

(c) *Laz v. Corporation of Darlington*, (1879) 5 Ex. D. 28.

(d) *Per Lord Cairns, River Wear*

Commissioners v. Adamson, (1876) 2 App. Cas. p. 750. See, too, *Nitro-Phosphate & Odams Chemical Manure Co. v. London & St. Katharine Dock Co.*, (1878) 9 Ch. D. 503.

duty imposed" (a). Thus a local authority in whom a sewer is vested, is not, in the absence of negligence, liable for an accident arising from the sewer being out of repair (b).

Nor is a local authority amenable to action when, in the reasonable exercise of its powers and for the public convenience, it decides on a course of action in a particular locality which adjacent owners fear will injure their property (c).

Where a corporation was empowered to make, erect, alter, maintain, repair, widen, deepen, scour, and cleanse certain water channels, it was held that they were bound to use these powers whenever occasion required for the purpose of preventing the flooding of the adjoining lands (d). But where certain powers were given solely for the purpose of the navigation of a river, and the defendant in pursuance of those powers erected certain staunches which caused accumulation of mud and weeds, and the river thereby overflowed and damaged the plaintiff, it was held that the defendants were not liable because they had no right or duty to do anything except for navigation purposes, and the mud and weeds did not interfere with the navigation (e).

Duty
involving the
exercise of a
discretion.

As a general rule, where the discharge of a public duty involves the exercise of a discretion no action lies if the discretion has been fairly and honestly exercised (f). Thus, it has been decided that guardians of the poor are not responsible, in their corporate capacity, for the negligence of their officials in the treatment of patients in a workhouse hospital, apparently upon the ground that the negligence of officials, in the selection of whom the guardians had exercised due diligence, could not relate back to the guardians, because the duty of selection had been fairly and honestly exercised by them (g). However, in *Cooper v. Wands-*

(a) *Hammond v. Vestry of St. Pancras*, (1874) L. R. 9 C. P. 322.

(b) *Hammond v. Vestry of St. Pancras*, (1874) L. R. 9 C. P. 316; *Lambert v. Lowestoft Corporation*, (1901) 1 Q. B. 590, in which latter case *dicta* of Lord Herschell to the contrary in *Municipal Council of Sydney v. Bourke* are explained.

(c) *Mayo v. Seaton Urban District Council*, (1904) 68 J. P. 7.

(d) *Geddis v. Proprietors of the Bann Reservoir*, (1878) 3 App. Cas. 430.

(e) *Cracknell v. Mayor of Thetford*, (1869) L. R. 4 C. P. 629.

(f) *Tozer v. Child*, (1856) 6 E. & B. 289; 7 E. & B. 377; *Partridge v. General Council of Medical Education*, (1890) 25 Q. B. D. 90.

(g) *Dunbar v. Guardians Ardee Union*, (1897) 2 Ir. R. 76.

worth Local Board (a), where the defendants under 18 & 19 Vict. c. 120, s. 76, had power, in default of notice given by a building owner, to order the demolition of the house, and exercised it without giving the owner an opportunity of being heard, it was held that they were liable in trespass, insomuch as the discretion vested in them was not arbitrary in its nature, but judicial, and had not been exercised at all (b).

(a) (1863) 14 C. B. N. S. 180.

Vestry of Clerkenwell v. Feary, (1890)

(b) See *Hopkins v. Smethwick Local Board*, (1890) 24 Q. B. D. 712, and cp. *Attorney-General v. Hooper*, (1893) 3 Ch. 483.

INTRODUCTION TO CANADIAN NOTES.

Messrs. Clerk and Lindsell's Treatise is both a scientific analysis of the general principles of the Law of Torts and also a practical book for the lawyer. The general principles of the law are, as might be expected, the same in the English-speaking provinces of Canada as in England. *Torts*, however, is not a subject, but an extensive group of subjects; and it is therefore not easy for the Canadian lawyer to be sure that the same general principle has been applied in any particular instance on this side as on the other side of the Atlantic. It will not require much research to discover that there are considerable variations between the law as laid down by English and by Canadian judges in such complex subjects as Trespass, Distress, Negligence, and the other branches of Torts, and that the decisions of both are much affected by differing statutory conditions. It is essential, therefore, to read the English edition carefully, sentence by sentence, knowing that the principle applied in each case will be highly defensible, but that the illustration used may be egregiously wrong in Canadian law.

The system of adding notes to the end of each chapter has, of course, its disadvantages, but is the system that best avoids the confusion of the English notes with the Canadian. The statutes and decisions have as far as possible been kept separate as to the provinces where they were enacted and decided. In some instances the volume of decisions would be much too bulky to insert here, and in these instances the editor has contented himself with indicating where the law will be found collected.

ACTION FOR CRIM. CON.

Curiously enough the first footnote (a) in the English edition illustrates a variation in our law.

(a) P. 1, *supra*.

The familiar action for crim. con. and alienation of affections is still in parts of Canada a remedy of the injured husband, and apparently it is not easy for him to divest himself of his remedy, as by a consent to separation (a) or by laches, provided the intercourse has continued to within six years (b).

This remedy is a purely masculine privilege; a wife has no action against another woman for alienation of her husband's affection and loss of support (c).

Of course, the chief use to which this somewhat conspicuous remedy is put is as a basis for a Parliamentary divorce in those provinces whose Courts have not or do not exercise a divorce jurisdiction (d).

For the methods of setting forth the evidence and verdict obtained in a crim. con. action in a bill of divorce, see Gemmill (e).

INDEPENDENT OF CONTRACT (f).

Contract or Tort.—The Ontario Division Courts have a jurisdiction up to \$60 in cases of tort, and up to \$100 in ordinary cases of contract. The amount sued for in *O'Brien v. Irving* (g) was \$90, and the injury complained of was that the defendant having hired the plaintiff's horse allowed him to be worked after he took sick by which his death took place:—Held, that this was an action for breach of contract in not taking proper care of the horse, not for a tort.

Waiver of Tort.—There are a number of New Brunswick cases where it has been held that the tort might be waived and an action ex-contractu brought for money had and received (h).

Third Parties.—The horse illustration given in the text (i) might have been based on the Upper Canadian case of *Walker v. Sharpe* (k), where the owner let the horse to S. and it was

(a) *C. v. D.*, 8 O. L. R. 308 (1904), Divisional Court, MacMahon, J., *diss.*

(b) *King v. Bailey*, 31 S. C. R. 338 (1901), *per* Gwynne, J.

(c) *Lellis v. Lambert*, 24 A. R. 653 (1897), discussing Married Women's Property Act, R. S. O. 1887, c. 132, and overruling *Quick v. Church*, 23 O. R. 262; followed in *Lawry v. Tuckett-Lawry*, 2 O. L. R. 162 (1901), Falconbridge, C. J., K. B.; see also *Fleury v. Campbell*, 18 P. R. 110.

(d) Nova Scotia and New Brunswick have divorce courts. Prince Edward Island has also a divorce procedure. British Columbia has a latent divorce jurisdiction. See article on Divorce by Mr. N. W. Hoyles, K.C., 37 Canada

Law Journal, 481.

(e) Parliamentary Divorce (Canadian); see also his article in 8 C. L. Times, p. 49.

(f) P. 2, *supra*.

(g) 7 P. R. 308 (1878), Galt, J.

(h) *McCulley v. Ward*, 5 All. 505; *Carrick v. Atkinson*, 5 All. 515, conversion of cargo on wrongful delivery of bill of lading; *Doyle v. Taylor*, Ber. (325) 201, sale of whole property without consent; see also *Beardsley v. Copeland*, 3 All. 458, case of servant's earnings in breach of hiring contract.

(i) Pp. 2, 3.

(k) 31 U. C. R. 340 (1871), Morrison, J. The servant would probably also have been liable unless the injury was the

strangled in the defendant's stable owing to the negligence of the defendant's servant in tying it up in the stall. True, the defendant's contract was with S., but it was held that the owner might maintain an action for the tort.

Inducing Breach of Contract with Third Party.—A breach of contract of the character mentioned on p. 3 is a feature not uncommon to the operation of trade combines, and may lead not only to actions of tort, but to criminal proceedings for conspiracy. As observed by the Chancellor of Ontario, Sir John Boyd, in sentencing the *Forty Plumbers* (a), "There are cases wherein questions of degree make all the difference. Dealers seek to combine to control or enhance prices or to prevent competition. It is a question of less or more as to how far they can go before the combination becomes a conspiracy."

CUSTODY OF CHILDREN (b).

A provision similar to that of the English Judicature Act is **Ontario.** in force. "In questions relating to the custody and education of infants the rules of equity shall prevail" (c). This is further modified by R. S. O. 1897, c. 168 (d).

The custody of infants is governed by C. O. N. W. T. 1898, **Alberta and Saskatchewan.** c. 21, Order XLV.

The Judicature Act is not in force. The law relating to the **British Columbia.** custody of children is modified by Rev. Stat. B. C. 1897, c. 96, An Act to consolidate and amend the law relating to the Custody and Care of Infants.

The provision of the Judicature Act has been carried into the **Manitoba.** King's Bench Act, R. S. M. 1902, c. 40, s. 39 (q). See also "The Infants Act" (e).

It is *primâ facie* the right of a father to have the custody of his infant child and the care of its education and bringing up, and the Court is always unwilling to interfere with his common law rights (f).

The Court has discretion as to the custody of an illegitimate child (g).

result of an inevitable accident; see *Murphy v. Dalhanty*, 2 N. S. B. (Gildert and Oxley), 294 (1871), Des Barres, J.; see also *Templeton v. Waddington*, 14 Man. L. R. 495 (1904), liability of stable-keeper for injury to horse kept in his stable.

(a) Jan. 15th, 1906.

(b) Footnote (b) to p. 4, *supra*.

(c) R. S. O. 1897, c. 51, s. 58.

(d) See further the decisions collected in Holmstead and Langton, 3rd ed., pp. 19, 105-110.

(e) R. S. M. 1902, c. 79.

(f) *Re Foulds*, 9 Man. L. R. 23 (1893), Taylor, C.J., not sufficient cause for interference that his wife cannot live happily with him.

(g) *Re Slater*, 14 Man. L. R. 523 (1903), Bain, J.

- New Brunswick.** The law as to custody of infants is dealt with in "The Supreme Court in Equity Act," Con. S. N. B. 1903, c. 112, ss. 186-198. As a general thing the Court will award the custody of the child to the father unless satisfied that it would not be for the child's welfare (*a*). A father cannot as a rule by mere agreement deprive himself of his right to the custody of his child (*b*).
- Nova Scotia.** The custody of infants is dealt with by R. S. N. S. 1900, c. 121 (*c*).

COMPENSATION TO CHILD FOR DEATH OF PARENT (*d*).

- Ontario.** The law in Ontario relating to this is governed by R. S. O. 1897, c. 166.
- Alberta and Saskatchewan.** C. O. N. W. T. 1898, c. 48.
- British Columbia.** R. S. B. C. 1897, c. 58.
- Manitoba.** R. S. Man. 1902, c. 31 (*e*).
- New Brunswick.** C. S. N. B. 1903, c. 79 (*f*).
- Nova Scotia.** R. S. N. S. 1900, c. 178.

HUSBAND AND WIFE: LOSS OF CONSORTIUM (*g*).

A husband may sue his father-in-law where the latter has without sufficient cause, by a display of force, taken the wife away from the husband's house (*h*).

(*a*) *In re Armstrong, an Infant*, 1 Eq. 208.

(*b*) *In re Annie E. Halpeld, an Infant*, 1 Eq. 142; cf. *In re Era Coram*, 25 N. B. R. 404.

(*c*) See *In re James William Black*, Congdon's N. S. Digest, 647, for jurisdiction of Court. See also R. S. N. S. c. 122, the Adoption of Children; amended N. S. Laws, 1901, c. 47.

(*d*) P. 5, *supra*.

(*e*) See *Van Wart v. New Brunswick R. Co.*, 17 S. C. R. 35. See *Runciman v. Star Line Steamship Co.*, 35 N. B. R. 123, (1900) as to principle on which damages should be assessed.

(*f*) Formerly held that action must

be brought by executor or administrator: *Pearson v. Canadian Pacific R. Co.*, 12 Man. L. R. 112 (1898), Dubuc, J. Brother of deceased took out administration and refused to sue; wife sued. But see s. 4 of the R. S. M. 1902, c. 31. It has been held that damages must be calculated with reference to a reasonable expectation of pecuniary benefit from continuance of life; see *Davidson v. Stuart*, 14 Man. L. R. 74 (1902), affirmed 34 S. C. R. 215.

(*g*) P. 5, *supra*.

(*h*) *Metcalf v. Roberts*, 23 O. R. 130 (1893), Falconbridge, J. For action by wife, see *Lellis v. Lambert*, cited p. 39a, *supra*.

ASHBY *v.* WHITE: REFUSING TO ACCEPT VOTE (a).

Generally.—The statutes relating to Parliamentary elections usually provide penalties for returning or deputy returning officers improperly refusing votes (b). The success of the aggrieved person in recovering will depend on whether the refusal was ministerial or judicial (c), and whether the officer was malicious or honest in his refusal (d). The returning officer is not protected as a public officer under R. S. O. 1897, c. 88 and c. 89 (e).

A deputy returning officer *de facto*, although his appointment may have been informal, is liable to the statutory penalties (f). Manitoba.

In *Anderson v. Hicks* (g) the Court was evenly divided on the questions whether the D. R. O. was acting in a judicial or ministerial capacity, and whether, on the theory of proof of malice being necessary, the circumstances were sufficient evidence of the refusal being wilful and corrupt. Nova Scotia.

If there is an intention to proceed against the returning officer in an election trial he should be served with a copy of the petition (h).

STRAYING CATTLE (i): FENCES.

In the earlier cases in Upper Canada there was a disinclination to hold the common law applicable to the circumstances of the Colony (k). Ontario.

Thus it was held that a landowner in Upper Canada must fence *against* cattle (l). But trespass was held maintainable against the owner of a bull which had broken into the plaintiff's close and there killed his mare, the defendant being present or aware of the act (m).

(a) P. 6, *supra*. The doubt raised by Clerk and Lindsell as to whether "the political franchise, like other franchises, was to be regarded as a right of property," has not yet reached some parts of this Dominion.

(b) *E.g.*, R. S. O. 1897, c. 9, s. 194; R. S. B. C. 1897, c. 67, s. 196; C. S. N. B. 1903, c. 3, s. 100; R. S. N. S. 1900, s. 110. See also R. S. N. S., c. 4, s. 40, amended by N. S. Laws, 1901, c. 19, s. 5 (d) as to "revisers." C. O. N. W. T. c. 3, s. 128; R. S. M. 1902, c. 52, s. 275.

(c) *Walton v. Appjohn*, 5 O. R. 65 (1884), Hagarty, C.J.

(d) *Johnson v. Allen*, 26 O. R. 550 (1895). Boyd, C.; see *Hastings v. Summerfelt*, 30 O. R. 577 (1899), Falconbridge, J., acts committed "wilfully."

(e) *McVittie v. O'Brien*, 27 O. R. 710

(1896), Meredith, C.J.

(f) *Reg. v. Holman*, 10 Man. L. R. 272 (1894); case under R. S. C. c. 8, ss. 30 and 100.

(g) 35 N. S. R. 161 (1902), name on voters' list, plaintiff refused ballot by D. R. O.

(h) *McNeil v. McNeil*, 7 R. & G. 67 (1886), McDonald, J.

(i) See pp. 10, 11.

(k) See article on Fences, by Mr. R. M. Macdonald in 15 C. L. T. at p. 151.

(l) *Spafford v. Hubble*, M. T. 2 Vict. Dig. Ont. Case Law, p. 2785.

(m) *Mason v. Morgan*, 24 U. C. R. 328 (1865), Hagarty, J.; cf. *Ives v. Hitchcock*, Dra. 247 (1830), where there was a ruinous fence and no knowledge on part of owner of escaping animal.

Ontario.

At the present time the ground is pretty well covered by legislation.

R. S. O. 1897, c. 272 (an Act respecting Pounds), provides, s. 2: "The owner or occupant of any land shall be responsible for any damage caused by any animal under his charge and keeping, as though such animal were his own property, and the owner of any animal not permitted to run at large by the by-laws of the municipality shall be liable for any damage done by such animal although the fence enclosing the premises was not of the height required by such by-laws" (a).

3 Edw. VII. c. 19 (Ont.), s. 548 ("The Consolidated Municipal Amendment Act, 1903") makes provision for by-laws by municipalities settling the height, extent and description of fences along highways, division fences, barbed wire fences, and other fences.

Sect. 546 makes provision for by-laws providing for pounds and for restraining and regulating the running at large or trespassing of animals (b).

R. S. O. 1897, c. 284 (The Line Fences Act), imposes on adjoining owners a duty to "make, keep up and repair a just proportion of the fence which marks the boundaries between them," and provides machinery for enforcing the performance of the duty.

Rule of Liability in Ontario.—"When it is not the duty of either party to keep up any particular and defined portion of the division fence, the one whose cattle trespasses on his neighbour's land is answerable for the trespass; that is, he must keep his cattle from his neighbour's land at his own risk" (c).

Alberta and Saskatchewan.

A provision similar to that in the Ontario Pound Act is in force: C. O. N. W. T. 1898 (The Pound District Ordinance), c. 79, s. 15. This practically enacts the common law (d).

The Municipal Ordinance, C. O. N. W. T. 1898, c. 70, s. 95, provides (sub-s. 75) for by-laws "restraining and regulating the running at large or trespassing of any animals," &c.

The Fence Ordinance, O. N. W. T. 1903, c. 28, establishes a duty on adjoining owners to contribute (e), and a liability of the owner of any domestic animal breaking into lawfully fenced lands (f). The Ordinance provides machinery for settling differences.

British Columbia.

R. S. B. C. 1897, c. 77 (Fence Act), defines a *lawful fence* (s. 3), and provides that as to lands unprotected by a lawful fence the

(a) This in effect enacts the common law. See *Crowe v. Steeper*, 46 U. C. R. at p. 92.

(b) This authority extends no further than to allow the running at large upon the roads and highways of the municipality: *Fensom v. C. P. R.*, 8 O. L. R. 688 (1904), *per* Osler, J.A.

(c) *Buist v. McCombe*, 8 A. R. 598 (1882), followed in *Barber v. Cleare*, O. L. R. 215 (1901), MacMahon, J.

(d) See also c. 80 (Estray Animals); c. 81 (Herds); c. 78 (Entire Animals).

(e) s. 6.

(f) s. 7.

straying of cattle is not a trespass (s. 4), and as to lands enclosed by a lawful fence the owner of the cattle is liable for damages (s. 5). **British Columbia.**

R. S. B. C. 1897, c. 76 (Line Fences and Watercourses Act), establishes a duty to fence as between adjoining owners and a procedure in case of disputes.

R. S. B. C. 1897, c. 144 (Municipal Clauses Act), provides, s. 50 (24), for by-laws establishing pounds and regulating the running at large of any animals. See s. 50 (47), defining a lawful fence within the boundaries of the municipality.

See also R. S. B. C. 1897, c. 7 (Animals Act); c. 41 (Cattle Ranges Act); c. 114 (Breeding Stock Act).

R. S. M. 1902, c. 13 (Boundary Lines Act), provides a procedure for surveying and erecting line fences. **Manitoba.**

R. S. M. 1902, c. 116 (The Municipal Act), s. 636, authorises by-laws settling what is a lawful fence along highways or boundary lines; s. 643, for impounding and regulating the running at large of any animals and appraising the damages for their trespassing; s. 644, for establishing pounds, limiting the right to recover damages for trespass by cattle, and restricting the running at large of cattle.

See also c. 5 (The Animals Act), prohibiting certain animals running at large.

Common Law and Statutory Liability.—The provision in the Boundary Lines Act does not supersede the common law liability of an owner of cattle for all their trespasses except such as are due to defects in fences which the complainant is bound as between himself and such owner to keep up; and he must show that the complainant was bound to keep up and repair the particular part of the fence through which the cattle entered (a).

C. S. N. B. 1903, c. 187 (Fences, Trespasses, and Pounds), defines lawful fence (s. 2); provides a procedure as to line fences (ss. 8-14); provides for pounds (ss. 15-34); fixes the rules as to liability for trespass by cattle (ss. 35-38). **New Brunswick.**

C. S. N. B. 1903, c. 165 (The Municipalities Act), provides power to make by-laws, s. 95 (37) regulating the running at large of animals; s. 95 (48) preventing trespasses by cattle and preventing cattle from going at large.

4 Edw. VII. c. 20 (N. B.), Act relating to cattle running at large.

R. S. N. S. 1900, c. 92 (Stray Cattle and Animals Going at Large). **Nova Scotia.**

R. S. N. S. 1900, c. 93 (Fences and Impounding of Cattle), defines fences (s. 2); provides procedure for division fences (ss. 6-13); establishes rules of liability for damages (ss. 14-19); provides for pounds (ss. 20-26).

R. S. N. S. 1900, c. 70 (The Municipal Act), gives power to make by-laws, s. 134 (24) restraining and regulating the running

(a) *Garrioch v. McKay*, 13 Man. L. R. 404 (1901).

Nova Scotia.	at large of any animals; s. 134 (22) establishing pounds; s. 134 (20, 21) regulating fences.
Prince Edward Island.	14 Vict. c. 14 (Stray Cattle), continued by 46 Vict. c. 8. 15 Vict. c. 10 (Division Fences), continued by 47 Vict. c. 11.

LIABILITY OF RAILWAY TO FENCE.

Dominion.	3 Edw. VII. c. 58 (Can.), The Railway Act 1903 establishes the duties of such railways as are under the Dominion jurisdiction in the matter of fences, gates and cattleguards (a). Some of the provinces have their own enactments, but a railway company under the Dominion jurisdiction is not bound to comply with the provincial legislation (b).
Ontario.	R. S. O. 1897, c. 207 (The Railway Act of Ontario), s. 30, fences; ss. 103-105, cattle at large; s. 106, crossings to be fenced.
British Columbia.	R. S. B. C. 1897, c. 163 (British Columbia Railway Act), s. 30, fences; s. 102, cattle at large; s. 103, crossings to be fenced.
Manitoba.	R. S. M. 1902, c. 145 (The Manitoba Railway Act), ss. 32-38, fences. R. S. M. 1902, c. 146 (The Manitoba Railway Act), ss. 27-28, cattle claims. The liability of a railway to fence arises by statute only, and exists only in favour of the owners or occupants of lands adjoining the railway (c). Where the land adjoining the railway is unoccupied the railway is not bound to fence that part (d). On the other hand, the fact that cattleguards are full of snow is evidence of negligence (e). A railway is not liable in damages for the death of an animal unless actually struck by train or engine (f).
New Brunswick.	C. S. N. B. 1903, c. 91, s. 19, fences, &c. The obligation to fence has been held general, and not merely as against the occupiers of land adjoining the railway (g). Where the statutory obligation is to fence where the railway passes

(a) Ss. 199, 200, 201. See the cases collected in MacMurchy & Denison, Canadian Railway Act, 1903, pp. 308-320.

(b) *Madden v. Nelson R. W. Co.*, 5 B. C. R. 541 (1899), A. C. 626; cf. *Grand Trunk R. W. Co. v. Therrien*, 30 S. C. R. 485.

(c) *Westbourne Cattle Co. v. Manitoba and North Western R. Co.*, 6 Man. L. R. 553 (1890), Taylor, C.J.

(d) *McFie v. Canadian Pacific R. Co.*, 2 Man. L. R. 6 (1884), Ardagh Co. J.; cf. *McMillan v. Manitoba and North-*

Western R. Co., 4 Man. L. R. 220 (1887); *Ferris v. Canadian Pacific R. Co.*, 19 Man. L. R. 501 (1894); case under Railway Act of Canada, 51 Vict. c. 29, s. 194, as amended by 53 Vict. c. 28, s. 2 and ss. 196, 198.

(e) *Phillips v. Canadian Pacific R. Co.*, 1 Man. L. R. 110 (1884)

(f) *McKellar v. C. P. R.*, 14 Man. L. R. 614 (1904).

(g) *St. John R. Co. v. Montgomery*, 21 N. B. R. 441; decision on 41 Vict. c. 92, s. 22.

through enclosed or improved land the onus is on the company to show that the land is unimproved (a). **New Brunswick.**

R. S. N. S. 1900, c. 99 (The Nova Scotia Railways Act), ss. 185-191, fences and cattleguards; s. 262, cattle not to be at large near railway; s. 263, cattle not to be driven within railway fences. **Nova Scotia.**

INJURIES TO SERVANTS (b).

A master suffering injury to his business by losing an employee through intimidation or violence has a remedy by injunction (c).

RAILWAY FIRES (d).

See the Railway Act, 1903, 3 Edw. VII. c. 58 (Can.), s. 239 dealing with the prevention and liability for fires (e). **Dominion.**

R. S. O. 1897, c. 267 (Preservation of Forests from Fire), ss. 9, 10, locomotives and engine drivers, precautions in fire districts. See *Brereton v. C. P. R.* (f). **Ontario.**

C. S. N. B. 1903, c. 94 (Protection of Woods from Fire), ss. 10, 11, locomotives, sparks, &c.; ss. 12, 13, duty of railway men. See *Campbell v. McGregor* (g); *Robinson v. New Brunswick Ry. Co.* (h). **New Brunswick.**

R. S. N. S. 1900, c. 91 (Protection of Woods against Fires), ss. 7, 8, 9, locomotives, &c. **Nova Scotia.**

PUBLIC AUTHORITY: PROTECTION OF PUBLIC OFFICERS (i).

Public officers in Ontario are protected by the Act to protect justices of the peace and *others* from vexatious actions. R. S. O. 1897, c. 88, and its companion Act, c. 89. **Ontario.**

C. O. N. W. T. 1898, c. 21 (Judicature), s. 536, actions against public officers (k). **Alberta and Saskatchewan.**

R. S. B. C. 1897, c. 128 (Magistrates Protection Act). **British Columbia.**

R. S. M. 1902, c. 104 (Magistrates), ss. 34-36. **Manitoba.**

(a) *New Brunswick R. Co. v. Armstrong*, 23 N. B. R. 193; decision on 33 Vict. c. 49 (N.B.), s. 14. See *Leresque v. New Brunswick R. Co.*, 29 N. B. R. 588, effect of declaration that railway "for the general advantage of Canada."

(b) P. 11, *supra*.

(c) See *Hynes v. Fisher*, 4 O. R. 60 (1893), Wilson, C.J.

(d) P. 13, *supra*.

(e) For the cases on the law as existing previously to this Act see MacMurchy & Denison, pp. 457-467.

(f) 29 O. R. 57 (1898), proper forum where to bring action.

(g) 29 N. B. R. 644 (1889), hay ignited by sparks.

(h) 11 S. C. R. 688 (1884), sparks.

(i) Pp. 13, 31, *supra*.

(k) The sheriff executing a *fi. fa.* was held not a public officer entitled to notice, &c., under s. 468 of the Judicature Ordinance, R. O. 1888, c. 8; *MacDonnell v. Robertson*, 1 Man. L. R. 434 (1893).

**New
Brunswick.**

C. S. N. B. 1903, c. 64 (Protection of Constables).
C. S. N. B. 1903, c. 65 (Protection of Justices).
C. S. N. B. 1903, c. 66 (Protection of Persons acting under Statute).

**Nova
Scotia.**

R. S. N. S. 1900, c. 40 (Protection of Justices of the Peace, including Stipendiary Magistrates).
R. S. N. S. 1900, c. 42 (Constables protected by).

NEGLIGENCE IN INFANTS (a).

Semble the doctrine of contributory negligence is not applicable to a child of tender years (b).

FORCIBLE EJECTION FROM DEFENDANT'S PREMISES (c).

There is a distinction between resisting a forcible attempt to enter and endeavouring to turn a person out of a house into which he has previously entered quietly. In the latter case a request to depart is necessary, but not in the former (d).

Though the motive and intention with which the defendant insisted on the plaintiff leaving his house cannot be inquired into (on the traverse *de injuria*) yet the truth of the assertion that he assaulted him in order to make him depart may be called in question (e). There is apparently some doubt in Nova Scotia as to whether a window is a fit and suitable place for ejection (f).

FAIR COMPETITION (g).

Manitoba.

The *Mogul* case has been followed in Manitoba in *Gibbons v. Metcalfe* (h). "Defendants agreed between themselves and with other members of their corporation not to deal with plaintiff. They did not do so for the purpose of injuring him in his business, or from any other malicious or bad motive; they asked him to conduct his dealing in grain according to the rules which had been established by the Grain Exchange for the protection of his business interests, and warned him that unless he did so they would cease to deal with him," &c. (h).

(a) P. 14, *supra*.

(b) *Sangster v. T. Eaton Co.*, 25 O. R. 78 (1894), Armour C.J.; *Gardner v. Grace*, 1 F. & F. approved of; S. C. 21 A. R. 624; 24 S. C. R. 708.

(c) P. 20, *supra*.

(d) *The Queen v. O'Neill*, 19 N. B. R. 49.

(e) *Davis v. Lennon*, 8 U. C. R. 599 (1852), Robinson, C.J.; cf. *Glass v. O'Grady*, 17 U. C. C. P. 233 (1866), Wilson, J., unnecessary force; *Spires v.*

Barrick, 14 U. C. R. 420 (1857), Robinson, C.J., appropriate conduct of person threatened with tar and feathers; *Madden v. Farley*, 6 U. C. R. 210 (1849).

(f) See *Kelly v. Rhodes*, 6 R. & G. 524; 6 C. L. T. 542.

(g) P. 24, *supra*.

(h) 1 Western Law Reports, 139 (1905), Full Court, per Dubuc, C.J.; *Allen v. Flood* (1898), A. C. 1 and *Mogul Case* (1892), A. C. 29, followed.

CONSPIRACY: TRADE UNION (a).

A conspiracy of members of a trade union to injure a non-union workman by depriving him of his employment besides being a tort (p. 27) is indictable (b). Ontario.

OBSTRUCTION OF HIGHWAY.

Winterbottom v. Lord Derby (c) has been followed in Ontario; and to maintain an action for obstructing a public way the plaintiff must show some substantial damage peculiar to himself beyond that suffered by the rest of the public who use the way. Being compelled along with the rest of the public to pursue one's journey by a less direct road is not such *special damage* (d). Where there is no peculiar injury to a private individual his remedy is by indictment (e). Apparently where a municipality is the plaintiff against a railway company it is not necessary to prove special damage other than the expense of the municipality is put to for repairing the road (f). Ontario.

The Attorney-General for the Province is the proper informant in a suit to restrain the obstruction of highways. Where the relator is also plaintiff it is necessary that he should have an interest (g). Manitoba.

There is a distinction between the mere right to use a highway and the attempt to use it, as giving a right of action in the one case and not in the other (h). New Brunswick.

MUNICIPAL LIABILITY FOR NON-REPAIR OF HIGHWAYS, BRIDGES, &c. (i).

The municipalities in Ontario are liable; and therefore our text-writers and judges are not put to the necessity of an elaborate and archaic explanation dating from A.D. 1466. The cases are very numerous (k), partly because of the number of accidents happening on our public roadways and partly because the amendment of the Municipal Act has had an invincible fascination for the members of our Legislative Assembly. Ontario.

(a) P. 25 *supra*.

(b) *Reg. v. Gibson*, 16 O. R. 704 (1889).

(c) P. 28, *supra*.

(d) *Baird v. Wilson*, 22 U. C. C. P. 491 (1872). See also *Fisher v. Township of Vaughan*, 12 U. C. R. 55 (1855); *Jarris v. Great Western R. W. Co.*, 3 U. C. C. P. 115 (1849).

(e) *Ward v. Great-Western R. W. Co.*, 13 U. C. R. 315 (1856); *Small v. Grand Trunk R. W. Co.*, 15 U. C. R. 23 (1857); *Brown v. Toronto and Nipissing R. W. Co.*, 26 U. C. C. P.

206 (1876), overruled by Gwynne, J., 13 S. C. R. 156 (1886); *Hamilton and Brock Road Co. v. Great Western R. W. Co.*, 17 U. C. R. 567 (1859); *Pewes v. Hall*, 29 U. C. R. 472 (1869).

(f) *Township of Sarnia v. Great Western R. W. Co.*, 17 U. C. R. 65 (1859).

(g) *Att.-Gen. v. Wright*, 3 Man. L. R. 197 (1886), Taylor, J.

(h) *Burton v. Dougherty*, 19 N. B. R. 51.

(i) Pp. 32 *et seq.*, *supra*.

(k) They occupy some fifty pages of the Digest Ontario Case Law.

Ontario.

Extent of Municipal Liability in Ontario.—The general rule in Ontario is expressed in ss. 606, 607 of the Consolidated Municipal Act, 1903, the effect of which is that where the corporation has *assumed* a road or bridge it is civilly liable for damages caused by non-repair. Accidents caused by snow or ice on sidewalks require “gross negligence.” There are sub-sections requiring prompt notice of the accident, and that action be brought within three months (a).

Alberta and Saskatchewan.

C. O. N. W. T. c. 70 (The Municipal Ordinance), s. 87 : “Every municipality shall keep in repair all sidewalks, crossings, sewers, culverts and approaches, grades and other works made or done by its council, and on default so to keep in repair shall be responsible for all damages sustained by any person by reason of such default, but the action must be brought within six months after the damages have been sustained.”

The municipality is liable where snow and ice are not removed within a reasonable time (b).

British Columbia.

See *Steves v. The Corporation of the District of S. Vancouver* (c). In the argument in this case it was stated that the provision of the Ontario Municipal Act making the Ontario municipalities civilly liable for non-repair of highways had been deliberately left out of the British Columbia statute. Drake, J., in his dissenting judgment says : “To permit a road to become dangerous for want of repair by a municipality is not actionable by one injured thereby, but to repair a road and thereby to make that which was a source of danger before a lesser danger may become actionable if an accident can be attributed to the negligence of the corporation in making the repairs.” See R. S. B. C. 1897, c. 144 (Municipal Clauses), ss. 50 (120) (127) ; 61, 243, 244.

Manitoba.

By R. S. Man. 1902, c. 116 (The Municipal Act), s. 667, the municipality is civilly responsible for damages. This has been held to extend to damages caused by “pitch holes” in the snow (d).

In *Curle v. City of Brandon* (e) two men with a nine-ton traction engine attempted to cross a bridge over the Assiniboine from Brandon to the north side of the river. A span of the approach broke and both were killed. A joist put in by the city five years previously had rotted nearly through. The defendants claimed contributory negligence in passing with so

(a) The decisions on these sections have been collected in a recent book, *The Law of Municipal Negligence respecting Highways*, by J. H. Denton (The Carswell Co.). See also ss. 608-612 of the Act.

(b) *Cuzner v. Calgary*, 1 Terr. L. R. 162 (1888).

(c) 6 B. C. R. 17 (1897), case of undermined tree falling and crushing plaintiff's husband ; cf. *Patterson v.*

Victoria, 5 B. C. R. 628 (1897), misfeasance and nonfeasance. *Gordon v. Victoria*, *ibid.* 553 ; *Smith v. Vancouver*, *ibid.* 491 ; *Lindell v. City of Victoria*, 3 B. C. R. 400 (1895), common law and statutory rights of action, Drake, J.

(d) *Kennedy v. Portage la Prairie*, 12 Man. L. R. 634 (1899). See also s. 668, limiting the roads to public ones.

(e) 1 Western Law Reporter, 176 (1905).

heavy a load instead of first planking the bridge, as had been **Manitoba.** done in other cases, and that this was not "ordinary traffic" as contemplated by Municipal Act. Defendants held liable.

Ice and Snow.—Extent of liability. See *Taylor v. City of Winnipeg* (a).

The Title of a Municipality to a Road.—Held a question of the title to a corporeal hereditament within meaning of County Court Act (b).

Former Law in Manitoba.—A municipality is not by the common law answerable in damages occasioned by defective highways or bridges. The general enactment of the Manitoba Legislature respecting roads (44 Vict., 2nd Sess., c. 5) "has not imposed any civil responsibility for neglect. In this respect our Act in force at the time this accident happened differs from that of Ontario" (c).

In the absence of a statute imposing liability for negligence or nonfeasance a municipality is not liable for injuries caused by lack of repairs, but is liable for acts of misfeasance such as constitute a nuisance (d). **New Brunswick.**

The tendency of the New Brunswick Courts since the decision in *City of St. John v. Campbell* (e) is to require that a misfeasance, and not merely a nonfeasance, on the part of the municipality must be alleged and proved (f).

Thus the failure to remove snow from the tracks of a street railway is a mere nonfeasance for which the corporation is not liable (g).

The following cities and towns were previously to *City of St. John v. Campbell* (*supra*) held liable for injuries caused by non-repair of streets: Portland (h), St. John (i), Moncton (k).

A general statement of the law applicable to this Province is **Nova Scotia.** to be found in *Thomas v. Town of Annapolis* (l): "In the case of

(a) 12 Man. L. R. 479 (1898), Killam, J., a question of circumstances in each case.

(b) See *Municipality of Louise v. C. P. R.*, 14 Man. L. R. 1 (1902).

(c) *Wallis v. The Municipality of Assiniboia*, 4 Man. L. R. 89 (1887).

(d) *City of St. John v. Campbell*, 26 S. C. R. 1 (1896), following *Pictou v. Goldert*, (1893) A. C. 524.

(e) 26 S. C. R. 1 (1896).

(f) See *Rolsten v. City of St. John*, 36 N. B. R. 574 (1904).

(g) *McCrea v. City of St. John*, 36 N. B. R. 144 (1903), following *Campbell v. City of St. John*.

(h) *Christie v. City of Portland*, 29 N. B. R. 311; 30 N. B. R. 492; 21 S. C. R. 1. See *Williams v. City of*

Portland, 29 N. B. R. 1; 19 S. C. R. 159 where work not done negligently.

(i) *Driscoll v. Mayor, &c., of City of St. John*, 29 N. B. R. 150, sidewalk on inclined plane; *Lockhart v. City of St. John*, 30 N. B. R. 445, defective railing; *Kinnealy v. Mayor of St. John*, 30 N. B. R. 46. But see *City of St. John v. Campbell, supra*.

(k) *Cameron v. Town of Moncton*, 29 N. B. R. 372, dangerous state of sidewalk caused by wrongdoer does not relieve corporation of liability.

(l) 28 N. S. R. 555 (1896), Townshend, J., case of accident caused by grating in sidewalk and doubt whether negligence was in the original construction or the repair. See application in this case of Privy Council decision in

Nova
Scotia.

the *Municipality of Pictou v. Geldert* (a), the Judicial Committee of the Privy Council laid down a very plain rule which must govern us. Lord Hobhouse said: 'It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed.' "

The common law and statutory liability of the corporation were very fully discussed in *Walker v. City of Halifax* (b). On an appeal to the Supreme Court of Canada it was held that it was the duty of the corporation to keep its streets in repair and that the plaintiff was entitled to a verdict, having proved special injury (c). The statutory liability in this case was founded on 27 Vict. c. 81 (N. S.), s. 264 (d), and 35 Vict. c. 34 (N. S.), peculiar to the city of Halifax.

See R. S. N. S. 1900, c. 71 (The Towns Incorporation Act), s. 170, public streets and bridges vested in town in so far as consistent with use by public. N. S. Laws, 1902, c. 21, s. 1.

As to Bridges, see N. S. Laws, 1903-4, c. 5 (The Bridge Act), s. 9: "The moneys annually required for the repair of longer bridges and the construction and repair of smaller bridges shall be appropriated out of the revenue of the Province."

An action *ex delicto* (e) against a municipality must be brought within a fixed period and after one month's notice (f). See *Messenger v. Town of Bridgetown* (g), contributory negligence in plaintiff driving over obstruction at night without due care.

MUNICIPAL LIABILITY ARISING OUT OF SEWERS
AND DRAINS (h).

Ontario.

There is a provision in s. 554 of the Consolidated Municipal Act, 1903 (Ontario), giving municipalities powers as to construction, &c., of drains, sewers, or watercourses, "but subject always to the payment of compensation to persons who may suffer

Bathurst v. McPherson, 4 App. Cas. 256, and *Municipal Council of Sydney v. Bourke*, (1895) App. Cas. 433.

(a) (1893) App. Cas. 524.

(b) 4 R. & G. 371 (1883).

(c) Cas. Digest 175, Feb. 16th, 1885; see full report in Cameron's Sup. Ct. Cas. 569. See also *Erans v. City of Halifax*, 1 Old. 111, earth left on street all night; *King v. Municipality of Kings*, 7 R. & G. 68, 7 C. L. T. 119, pre-

cipitous embankment on highway.

(d) City Charter of Halifax, 1864.

(e) *Ex delicto*. See *Archibald v. Town of Truro*, 33 N. S. R. 401 (1900); 31 S. C. R. 380, where trespass a continuing one.

(f) R. S. N. S. 1900, c. 70, s. 147 (The Municipal Act); R. S. N. S. 1900, c. 71, s. 274 (The Town Incorporation Act).

(g) 33 N. S. R. 291 (1900).

(h) P. 36, *supra*.

injury therefrom and to any restrictions and liabilities imposed by this Act in that respect or otherwise" (a). **Ontario.**

See C. O. N. W. T. c. 70, s. 87, p. 39k, *supra*.

**Alberta and
Saskatche-
wan.**

See R. S. B. C. 1897, c. 144, s. 50 (112-118), powers as to sewers: ss. 264, 265, provisions (as to reclamation works) for arbitration as to damages. **British
Columbia.**

See R. S. M. 1902, c. 50 (The Land Drainage Act): s. 40 puts the duty of keeping in repair on the municipality; s. 42 gives the Minister of Public Works power to award damages occasioned by the performance of any work under the Act. **Manitoba.**

Cf. c. 144, s. 723 (arbitration as to lands damaged).

Actions for Tort or Arbitration?—An action will lie against a municipality for doing negligently what it is authorised to do by the Legislature, the remedy by arbitration (s. 723 of Municipal Act) being confined to any damage necessarily resulting from the exercise of such powers (b).

In *Lirette v. City of Moncton* (c) it was held that the city having the statutory authority to construct a sewer, and having built it after plans made by a competent engineer and adopted by the council, was not guilty of actionable negligence on account of the insufficiency of the sewer to answer its purpose, and a person thereby injured has no remedy by action at law; and it makes no difference in this particular whether the use of the sewer is voluntary or under compulsion. **New
Brunswick.**

R. S. N. S. 1900, c. 66 (The Marsh Act), s. 26, provides compensation for damages by works for drainage. **Nova
Scotia.**

Where plaintiff's horse was injured by falling into a deep uncovered drain by the side of a road in the suburbs of the city:—Held, that the drain being proved to be well constructed and of a kind (uncovered) usual in the suburbs, the city was not liable (d).

SHERIFF, NEGLIGENT EXECUTION BY (e).

What is due diligence in the execution of a *fi. fa.* is a question for the jury; the sheriff is not bound to keep sentinel day and **Ontario.**

(a) See Biggar's Municipal Manual, 1900, pp. 648-651, for a collection of cases. See also The Municipal Drainage Act, R. S. O. 1897, c. 226; The Ditches and Watercourses Act, R. S. O. 1897, c. 285; and Clarke & Scully's Drainage Cases, vols. 1 and 2. *Portage la Prairie*, 9 Man. L. R. 192 (1893).

(c) 36 N. B. R. 475 (1904). See C. S. N. B. 1903, c. 159 (Sewers and Marsh Lands), s. 183, compensation for injury to land.

(d) *McKinley v. City of Halifax*, 2 Rus. & C. 305 (1876), Smith, J. See also *Jennison v. Municipality of East Hants*, 6 R. & G. 71; 6 C. L. T. 141 (1885), liability of municipality for negligence of surveyor of highways.

(e) P. 37, *supra*.

(b) *Foster v. Municipality of Lansdowne*, 12 Man. L. R. 41 (1897), Killam, J., wrongful construction of ditch; flooding of plaintiff's lands; careful selection of corporation's servants immaterial. See also *Atcheson v.*

CHAPTER II.

PARTIES.

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As a general rule all persons are entitled to sue and liable to be sued in actions of tort; but this rule is subject to certain exceptions.

The Crown cannot be sued for a tort, but its agents can.

The sovereign cannot be sued. A petition of right will not lie for a tort (a), for “the king can do no wrong” (b). But this exemption of the sovereign from liability is personal; it does not extend to public officers of state acting on behalf of the Crown; for the maxim that the king can do no wrong involves the proposition that he cannot authorise a wrong, and, “as the sovereign cannot authorise a wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown” (c). The agent is responsible, even though the act be directly ordered by the Crown (d). Whether the case of a soldier acting under the orders of his superior officer forms any exception to the general rule has never been decided, but presumably it does not (e). An action of tort when brought against an officer of state must be

(a) *Tubin v. Queen*, (1864) 16 C. B. N. S. 310; *Feather v. Queen*, (1865) 6 B. & S. 257; *Viscount Canterbury v. Attorney-General*, (1842) 1 Phillips, 306.

(b) Hale, P. C., Vol. 1, p. 43.

(c) *Per Cockburn, C.J.*, (1865) 6 B. &

S. p. 296.

(d) *Rogers v. Rajendro Dutt*, (1860) 13 Moore, P. C. p. 236.

(e) See *Keighly v. Bell*, (1866) 4 F. & F. 763, Willes, J., pp. 790 and 805. With respect to the responsibility of

brought against him personally ; the Government revenue cannot be reached by an action against a public officer in his official capacity (a).

To this rule, however, that agents of the Crown are personally liable for torts committed by them as such, an exception exists in cases in which the party injured is the subject of a foreign state. An injury inflicted upon a foreigner, if done by the authority of or ratified by the Crown, cannot give rise to a cause of action. Thus, where a commander of a British ship, employed in the suppression of the slave trade, burnt the barracoons of a Spanish slave-dealer, and his act was subsequently ratified by the British Government, it was held that such ratification was a defence to an action against him at the suit of the slave-dealer (b), upon the ground that "where an act injurious to a foreigner, and which might otherwise afford a ground of action, is done by a British subject, and the act is adopted by the Government of this country, it becomes the act of the State, and the private right of action becomes merged in the international question which arises between our Government and that of the foreigner" (c).

Again, the liability of public officers of state is limited to torts which they have personally committed or actually authorised ; they are not responsible for the negligence or unauthorised torts of their subordinate officials (d). "The Keeper of the Great Seal and other persons holding high situations in the State have authority to appoint to many offices, and also to remove the persons so appointed at their pleasure. But they are not on

soldiers who fire upon a riotous mob, it has been said that "the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen." *Per Tindal, C.J.*, 5 C. & P. p. 263 (n.). And although it may be (as has been suggested in Sir J. Stephen's History of the Criminal Law, Vol. 1, p. 205, and in Dicey on The Constitution, p. 284) that a soldier, who in obedience to an order of a superior officer, unjustifiably given, fires upon and kills or injures persons engaged in a riot, is not criminally responsible if the order was given under such circumstances that the

soldier might reasonably suppose the superior to have good grounds for giving it, that question will not affect his civil responsibility, which must be wholly independent of his belief. For further discussion on this subject, see below, p. 72.

(a) *Palmer v. Hutchinson*, (1881) 6 App. Cas. 619.

(b) *Buron v. Denman*, (1848) 2 Exch. 167.

(c) *Per Cockburn, C.J.*, (1865) 6 B. & S. p. 296.

(d) *Whitfield v. Lord Le Despencer*, (1778) 2 Cowp. 754.

that account subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability" (a). The reason of this is, that the subordinate officials are the servants of the Crown and not of the superior officer who selects them (b). The fact, however, that a public body acts for the whole nation at large does not necessarily make it a Crown department for this purpose; such a public body, if it employs its own subordinate officers and other agents on its own behalf and not on behalf of the Crown, is liable for the torts of its agents to the same extent as any private employer would be liable (c).

Foreign
sovereigns.

An action will not lie against a foreign sovereign, for he is exempt from the jurisdiction of our Courts, on the ground that "the exercise of such jurisdiction would be incompatible with his regal dignity, that is to say, with his absolute independence of every superior authority" (d). And not only can he not be sued personally, but neither can an action *in rem* be brought against his property, for the attaching of the *res* is an indirect impleading of its owner (e), and the fact that the foreign sovereign uses the *res* for trading purposes, and not for public purposes directly connected with the *jus coronæ*, makes no difference (f).

Ambassadors.

Ambassadors also who are accredited to this country by a foreign government are free from the jurisdiction of our Courts, on the ground that they are the representatives of the sovereign or state which sends them; and the fact that an action brought against an ambassador may arise out of commercial transactions in which he is engaged is immaterial (g). "This immunity extends not only to the person of the minister but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides" (h).

(a) *Per* Lord Lyndhurst, *Viscount Canterbury v. Attorney-General*, (1842) 1 Phillips, p. 324.

(b) See below, p. 72.

(c) *Gilbert v. Corporation of Trinity House*, (1881) 17 Q. B. D. 795.

(d) *Per* Brett, L.J., *The Parlement Belge*, (1880) 5 P. D. p. 207; and see *Mighell v. Sultan of Johore*, (1894) 1

Q. B. 149, C. A.

(e) *The Parlement Belge*, (1880) 5 P. D. 197; *Varasseur v. Krupp*, (1878) 9 Ch. D. 351.

(f) *The Parlement Belge*, *supra*.

(g) *Magdalena Steam Navigation v. Martin*, (1859) 2 E. & E. 94.

(h) Wheaton, *Int. Law*, Ed. 1866, s. 225.

This rule holds good even when the ambassador so accredited to this country is a British subject, unless he has been received by the British Government on the express terms of his being subject to the jurisdiction of our Courts (*a*). The privilege of an ambassador extends up to a reasonable time after presenting his letters of recall (*b*). Whilst the privilege continues the Statute of Limitations does not begin to run against his creditors (*c*).

A foreign sovereign or ambassador may waive his privilege, and if he appears and defends up to judgment, it is then too late to have the proceedings stayed (*d*). But nothing short of appearance will amount to submission to the jurisdiction. The privilege cannot be waived by anything done before action brought. Thus the fact of a foreign sovereign residing in this country and entering into a contract under an assumed name, as if he were a private individual, does not amount to a submission to the jurisdiction (*e*). Moreover, where a foreign sovereign by suing in the Courts of this country actually submits to the jurisdiction, such submission is strictly limited in its character, and will only entitle the defendant to obtain discovery of documents and set up a counterclaim by way of defence (*f*).

A felon could not by the common law sue for torts to his property, for his property was forfeited to the Crown; but forfeiture for felony has now been abolished by the Felony Act, 1870 (*g*). By that Act the right to sue for any injury to the property of a convict (which term is defined to mean any person against whom judgment of death or penal servitude shall have been pronounced on any charge of treason or felony (*h*)) is vested in the administrator or interim curator, as the case may be, during the time that the convict is subject to the operation of the Act, that is to say, until the convict's death, bankruptcy, or the completion of his term of punishment, original or substituted, or

When felons
may sue.

(*a*) *Macartney v. Garbutt*, (1890) 24 Q. B. D. 368.

(*b*) *Musurus Bey v. Gadban*, (1894) 2 Q. B. 352.

(*c*) *Ibid.*

(*d*) *Taylor v. Best*, (1854) 14 C. B. 487

(*e*) *Mighell v. Sultan of Johore* (1894) 1 Q. B. 149.

(*f*) *South African Republic v. Compagnie Franco-Belge du Chemin de Fer du Nord*, (1898) 1 Ch. 190.

(*g*) 33 & 34 Vict. c. 23, s. 1.

(*h*) s. 6.

until he shall have received a royal pardon (a) ; subject to this exception, that a convict may sue in respect of any property acquired by him while lawfully at large under a ticket of leave (b). A felon who is not a convict as above defined, such as one who has been sentenced to a term of imprisonment only, may apparently sue for torts to his property in his own name. Even at common law a felon might sue for any personal wrong, such as assault or slander (c) ; and it is apprehended that he may still do so in his own name, notwithstanding the language of s. 8 of the above Act, which provides that no action for the recovery of "any damage whatsoever" shall be brought by any convict while he is subject to the operation of the Act, for the term "damage" in that section must probably be understood as confined to damage to property. If it were otherwise, the convict might be altogether without redress, for actions for personal damage do not pass to the administrator. It has, however, been decided that a person who has been convicted of a crime, is not entitled, so long as the sentence is unreversed, to maintain an action against a witness for negligently giving false evidence upon his trial, although such evidence largely conduced to his wrongful conviction, a determination of the proceedings in favour of the accused being a condition precedent to action under such circumstances (d).

Bankrupts.

Bankrupts may be sued for torts of all kinds, whether committed before or during the bankruptcy ; bankruptcy does not operate as a discharge of a tort, for demands for unliquidated damages founded on tort are not debts provable against the bankrupt's estate (e).

A bankrupt cannot sue for any direct tort to property belonging to him at the date of the bankruptcy ; the cause of action for any injury whereby the estate divisible among the creditors is directly diminished, belongs to the trustee (f).

(a) ss. 10, 24.

(b) s. 30.

(c) Com. Dig. Forfeiture, B. 2.

(d) *Bynoe v. Bank of England*, (1902) 1 K. B. 467, C. A.

(e) 46 & 47 Vict. c. 52, s. 37. As to whether the action of a judgment debtor presenting his own petition in

bankruptcy to avoid payment amounts to an abuse of the process of the Court see *Archer, In re ; Archer, Ex parte*, (1904) 20 T. L. R. 390.

(f) *Hodgson v. Sidney*, (1866) L. R. 1 Ex. 313 ; *Morgan v. Steble*, (1872) L. R. 7 Q. B. 611.

But for injuries of a personal character, such as libel or assault, or the seduction of his servant (a), a bankrupt may sue. In some cases the act complained of may be such as to give rise to both kinds of damage, both a damage to property, and also a damage of a personal character; and in such cases the question as to what extent the cause of action will pass to the trustee seems to depend upon the following rules:—

(a) If only one of the two kinds of damage suffered is the direct consequence of the defendant's act, and the other is consequential merely, so that there is but one cause of action, then if the damage which is directly suffered is a damage to property, the cause of action passes to the trustee, and the bankrupt's remedy in respect of the injury to himself is gone; but if the damage which is directly suffered is of a personal character, the whole cause of action remains in the bankrupt. Thus, where the bankrupt is induced by the defendant's fraud to incur liabilities in consequence of which he is rendered insolvent and injured in credit and character, the primary damage being the pecuniary loss and the cause of action in respect of it passing out of the bankrupt, he is not entitled to say that enough of that cause of action remains in him to enable him to recover in respect of the consequential injury to his character (b), for a single cause of action cannot in such circumstances be split (c). So, on the other hand, where a person has been libelled, and the injury occasioned by the libel to such person's reputation has brought about his insolvency, the trustee cannot sue for the damage to the bankrupt's estate (d).

(b) If the act of the defendant be such as to give rise simultaneously to two distinct causes of action, one in respect of a damage to property, the other in respect of a personal damage, as for instance where a carriage which the bankrupt is driving is run into, and both carriage and driver are injured (e), the trustee may sue for the one and the bankrupt for the other (f).

(a) *Howard v. Crouther*, (1841) 8 M. & W. 601.

(b) *Hodgson v. Sidney*, (1866) L. R. 1 Ex. 313; *Morgan v. Steble*, (1872) L. R. 7 Q. B. 611.

(c) *Per* Bramwell, B., (1866) L. R. 1 Ex. p. 316

(d) *Per* Alderson, B., (1841) 8 M. & W. p. 604.

(e) *Brunsdon v. Humphrey*, (1884) 14 Q. B. D. 141.

(f) *Per* Bramwell, B., (1866) L. R. 1 Ex. p. 316.

(c) Intermediate between the two above classes of cases is that of a trespass to land or goods of which the bankrupt has the bare possession, and the trustee has the property; in which case it appears that the bankrupt may sue for the invasion of his possession, and recover damages nominal or substantial according as the trespass was or was not accompanied with matter of aggravation, and the trustee may sue in respect of his property or right of possession, and recover damages for any injury done to the land or any damage to or conversion of the goods. The authorities, indeed, only decide that the bankrupt may sue in respect of his possession; they do not expressly decide that he cannot recover in such action for the injury to the property, but they seem so to suggest (a). The point, however, is not clear.

Any property which a bankrupt may acquire after his adjudication and before his discharge is, until the trustee intervenes, to be regarded as the property of the bankrupt (b). For any torts to such property, therefore, the bankrupt, in the absence of any intervention by the trustee, may sue.

Infants—
how far
tenderness of
age material
to their
liability.

Infants are liable to be sued for torts of all kinds, and except when the action is founded upon malice or want of care, the tenderness of the infant's age is immaterial (c). Thus a child, however young, will be liable for the consequences of a direct trespass, although his youth may have rendered him unable to foresee those consequences; it will be sufficient to fix him with liability that he intended to do the physical act which constituted the trespass. In *Mangan v. Atterton* (d), where a child aged four put his fingers between the cogs of a machine while his school-fellows turned the handle, and then sought to recover damages from the owner of the machine for exposing it unfenced in a public place, Bramwell, B., said: "Suppose this machine had been of very delicate construction and had been injured by the

(a) *Brewer v. Dew*, (1843) 11 M. & W. 625; *Rogers v. Spence*, (1844) 13 M. & W. 571; 12 Cl. & F. 700.

(b) *Cohen v. Mitchell*, (1890) 25 Q. B. D. 262.

(c) As, however, apart from special contract, a parent is not responsible to a

third party for the debts or torts of his child, the utility of taking proceedings against a child is, in the majority of cases, problematical. See *McQueen, Law of Husband and Wife*, 4th ed. p. 82.

(d) (1866) L. R. 1 Ex. p. 240.

child's fingers, would not the child in spite of his tender years have been liable to an action?"

But where the cause of action depends on the malice or the negligence of the defendant, the child's age will be material, and it will be a question for the jury whether he was of such an age that he ought to have foreseen the consequences of his act, and that malice or want of due care could reasonably be predicated of him (a).

Where a cause of action is really founded upon contract, the plaintiff cannot avoid the defence of infancy by framing his action in tort. If goods are delivered to an infant under a contract of sale, and the infant was not guilty of any deception in concealing his infancy from the vendor, the latter cannot in an action of trover recover the goods or their value. This was always the rule at common law, and it is apprehended that the Infants' Relief Act, 1874 (b), makes no difference in this respect; the enactment that all contracts for goods supplied to infants which were theretofore by law voidable should be void, presumably merely meant that they should be incapable of ratification, and not that the party contracting with the infant should be entitled to treat the contract as a nullity.

Infant when liable in trover for goods delivered to him under a contract.

Moreover, in spite of the general rule of law that an infant is not liable, apart from deceit, for a misrepresentation that he was *sui juris*, whereby a party was induced to contract with him (c), it has been held that if the infant, at the time of obtaining the goods, was actually guilty of fraud in concealing his minority, the vendor may rescind the contract, and as the infant would no longer hold the goods under the contract the vendor may recover them in trover (d). But if before discovery of the fraud the infant has parted with the goods for value, it is then too late to rescind, and the vendor is without remedy; he cannot sue in deceit for damages, for that would be in substance a means of enforcing the contract to pay the price (e).

Where goods have been delivered to an infant under a contract

(a) See Ch. XV., and cases there cited 9 Ex. 422.

(d) *Mills v. Graham*, (1804) B. & P. 1 N. R. 140.

(b) 37 & 38 Vict. c. 62.

(c) *Liverpool Adelphi Loan Association v. Fairhurst and Wife*, (1854)

(e) *Johnson v. Pye*, (1663) 1 Sid. 258; *Price v. Hewett*, (1852) 8 Ex. 146.

of bailment, the bailor, in the absence of any fraudulent concealment of the infancy, cannot bring trover to recover the goods so long as the agreed term of bailment continues. But as soon as the bailment has ceased (a), either by effluxion of time, or by some act on the part of the infant, so inconsistent with the terms of the bailment as to entitle the bailor to treat it as determined, as, for instance, where the infant pledges the goods, the bailor may sue for the goods or their value.

When in
trespass.

An infant bailee may be sued for any independent trespass committed by him to the goods bailed. Whether in any particular case an improper dealing by the infant with the goods bailed to him is a mere breach of the contract or amounts to an independent tort it is not always easy to determine. It has been held that if an infant hire a horse, the riding of the horse for an improper distance is a mere excess of the hirer's rights under the contract, and if the horse be thereby injured he will not be liable (b); but if he jump the horse knowing it to be in an unfit condition to be jumped and being expressly prohibited from jumping it, that is an independent tort for which he will be liable (c). The question whether in such cases the wrongful act is a mere excess or outside the contract altogether, is one of degree.

Injury to
infant *en*
ventre sa mère.

Agreement to
settle action
voidable.

An action for personal injuries will not lie at the suit of an infant which was *en ventre sa mère* at the time of the accident (d). But an acceptance by an infant of a lump sum down as settlement in full of an action already commenced by the infant's guardian *ad litem* constitutes no bar to the proceedings (e).

Lunatics.

There is no reported instance of an action of tort ever having been brought in this country against a lunatic, but it is apprehended that lunatics are liable for torts to the same extent as sane persons, provided that the torts are committed by them while in that condition of mind which is essential to liability in sane persons. If a lunatic commit a trespass while in a state of frenzy he will not be liable any more than a sane person who

(a) See *per* Cave, J., in *Reg. v.* C. B. N. S. 45.

McDonald, (1885) 15 Q. B. D. p. 325.

(b) *Jennings v. Rundall*, (1799) 8 T. R. 335.

(c) *Burnard v. Haggis*, (1863) 14

(d) *Walker v. Great Northern R. Co. of Ireland*, (1890-1) 28 L. R. Ir. 69.

(e) *Mattei v. Vautro*, (1898) 7

L. T. 682.

does a similar act while under the influence of sudden terror which deprives him of all power of deliberate choice; but subject to that exception the defendant's lunacy will be no answer to an action of trespass, for he is capable of intending the physical act which he does (*a*). Whether a lunatic can be sued for a libel would seem to depend upon the question whether he was insane upon the subject to which the libel related; if he was, then presumably he would not be liable, for liability in libel depends upon a consciousness that the matter published is defamatory; but if he was sane on that subject, then, although insane on other subjects, he ought to be held answerable in damages (*b*). But there is no authority on the point to be found in the books.

The liability of a lunatic in an action for negligence seems to stand on the same footing as the liability of a young child in a similar action, that is to say, it is a question for the jury whether he was sufficiently self-possessed to be capable of taking care.

By the common law a married woman could not either sue or be sued unless her husband were joined with her as plaintiff or defendant, but now by the Married Women's Property Acts, 1882 and 1893, she may both sue and be sued in tort in all respects as if she were a *feme sole*, and any damages or costs recovered by her in any such action shall be her separate property, and any damages or costs recovered against her shall be payable out of her separate property (*c*). For torts committed by a woman before her marriage her husband was formerly liable to the full extent of the damages recovered, but now by the above Act his liability is limited to the extent of the property acquired by him through his wife (*d*). But for the wife's torts committed

Husband
when liable
for wife's
torts.

(*a*) In *Weater v. Ward*, (1616) Hob. 134. it is said without qualification that "if a lunatic hurt a man he shall answer in trespass," but this proposition would appear too wide.

In *Krom v. Schoonmaker*, (1848) 3 Barb. 647, it was decided in the Supreme Court of the United States that an action of false imprisonment lay against a lunatic who in his capacity of justice of the peace caused the plaintiff to be

wrongfully imprisoned; but it is presumed that the extent of the insanity in that case was not great.

(*b*) See Ch. XVII.

(*c*) 45 & 46 Vict. c. 75, s. 1; 56 & 57 Vict. c. 63, s. 1. The Act of 1893 extends the liability of married women for costs of litigation to separate estate restrained from anticipation.

(*d*) ss. 14, 15.

during coverture the husband's liability continues to be unlimited (a). And as the old common law action against the husband and wife jointly in respect of the torts of the wife still exists, there cannot be separate judgments with regard to the husband and wife. Consequently a payment into Court by the husband in satisfaction of the claim, coupled with a denial of liability by the wife, is not an admissible method of pleading (b). The reason why a husband was liable at common law for his wife's antenuptial and postnuptial torts was simply that during coverture she could not be sued without him (c). Therefore, as soon as the coverture comes to an end by divorce (d), or by the wife's death (e), the husband's liability ceases, even though an action to establish it may have already been commenced. It has also been expressly provided by statute that for torts committed by a wife while separated from her husband under a judicial separation he shall not be liable (f), but whether a decree of judicial separation has, like a divorce, the effect of causing a vested right of action to abate does not seem clear. A husband remains liable for his wife's torts committed during coverture although living apart from him under a voluntary separation (g), and probably also during the currency of a decree *nisi* (h).

It is, however, submitted, though there is apparently no direct authority to support the proposition, that the commission of a marital offence by a wife living, by agreement, apart from her husband should avoid the husband's liability for a tort committed by her, subsequently to the adultery.

In *Wainford v. Heyl* (i), Jessel, M.R., took a different view as to the ground of a husband's common law liability for his wife's torts; he said, "Strictly speaking, she cannot commit torts; they are the torts of her husband, and therefore she creates as against her husband a liability;" but this view seems irre-

(a) *Seroka v. Kattenburg*, (1886) 17 Q. B. D. 177; and see *Earle v. Kingscote*, (1900) 1 Ch. 203.

(b) *Beaumont v. Kaye*, (1904) 1 K. B. 292, C. A.

(c) *Per Erle, C.J.*, (1864) 17 C. B. N. S. p. 748.

(d) *Capel v. Powell*, (1864) 17 C. B. N. S. p. 743.

(e) *Per Willes, J.*, *Wright v. Leonard*, (1861) 11 C. B. N. S. p. 266.

(f) 20 & 21 Vict. c. 85, s. 26.

(g) *Head v. Briscoe*, (1833) 5 C. & P. 484.

(h) *Norman v. Villars*, (1877) 2 Ex. D. 359.

(i) (1875) L. R. 20 Eq. p. 324.

concilable with the judgments in *Capel v. Powell* (a), for if it were sound the husband's liability for his wife's tort ought to survive notwithstanding the determination of the coverture, which it does not.

A wife may sue her husband for a tort to her separate property (b), but he has apparently no corresponding right of action against her for torts to his property. Neither husband nor wife can sue the other for any tort of any other kind (c).

Wife may sue husband for tort to her separate property.

It was a general principle of the common law that actions of tort died with the person, whether the person so dying was the party injured or the tort-feasor (d). At common law the personal representatives of a deceased person could never sue in respect of torts committed in his lifetime to his person or his property, and with two exceptions they could never be sued for torts committed by him. But by the statute 4 Edw. III. c. 7, executors were enabled to sue for any injuries to the personal estate of their testator for which he might have sued if he were living, and this remedy has been extended by the Courts to administrators. The statute 15 Edw. III. c. 5, gives a like remedy to the executors of executors. The former statute speaks only of trespasses, but this term includes all injuries whereby the personal estate has directly been rendered less beneficial (e). Slander of title to a trade mark is an injury of this nature, and the action for it will survive to the executors of the party slandered (f). Where one person wrongfully digs and removes the coal or minerals of another person, the owner may waive the trespass to the realty and sue in trover for the coals or minerals as chattels (g), consequently executors may sue for the value of any minerals wrongfully dug and carried away during their testator's lifetime, although the wrongful act was committed more than six months (h) before the testator's death, for they

Personal representatives.

1. Remedies survive for torts to personal estate of deceased.

(a) (1864) 17 C. B. N. S. 743.

(b) 45 & 46 Vict. c. 75, s. 12.

(c) *Ibid.*

(d) The clause usually inserted in an order of reference to arbitration, to the effect that in case of death of either party before making the award it shall be delivered to their personal representatives, is inoperative where the

action is for a tort (*Bowker v. Evans*, (1885) 15 Q. B. D. 565).

(e) Williams on Executors, Pt. ii. Bk. iii. Ch. i. § i.

(f) *Hatchard v. Mege*, (1887) 18 Q. B. D. 771.

(g) See below, p. 358.

(h) Which is the limitation for injury to real estate. See below, p. 52.

may treat it as an injury to his personal estate under the statute of Edw. III. Anything which having formed part of or been attached to the freehold of an owner in fee or other person not impeachable of waste is severed from the freehold, becomes from the moment of severance part of the owner's personal estate, and for the removal of it or any injury to it after severance the cause of action passes to the executor. Thus, an executor may sue in trover for trees wrongfully cut down by a stranger in the testator's lifetime (a).

But where a testator sustains personal injuries from a tortious act, and in consequence is prevented from earning his livelihood and is put to expense in obtaining medical attendance, such special damage does not constitute an injury to his personal estate which will pass to the executor (b). But on the other hand where similar actions were brought by the executrices of persons who while travelling as passengers on the defendants' lines were injured in railway accidents, it was held that they might recover for medical expenses and for loss occasioned by the inability of the deceased persons to attend to their business, on the ground that the maxim *actio personalis moritur cum personâ*, never applied to damage to the deceased's estate when such damage was caused by breach of contract (c). The Statute of Limitations will run as against executors and administrators from the date of the accrual of the cause of action to the deceased.

2. For torts to real estate committed within six months before death.

By 3 & 4 Will. IV. c. 42, s. 2, it is provided that the personal representatives of a deceased person may within twelve months after his death maintain an action for any injury to his real estate committed in his lifetime, and not more than six months before his death.

3. Actions under Lord Campbell's Act.

The only cases in which an action for injuries to the person survives the death of the party injured are those provided by

(a) *Williams v. Breedon*, (1798) 1 B. & P. 329. The decision in *Emerson v. Emerson*, (1672) Ventr. 187, to the effect that the executor could not sue for the wrongful cutting and asportation of growing grass in the testator's lifetime, turned merely upon a point of pleading.

(b) *Pulling v. Great Eastern R. Co.*, (1882) 9 Q. B. D. 110. In this case the

deceased, who was not a passenger on the defendant's line, was run over by one of their trains while he was crossing the railway at a level crossing, so that the damages sought to be recovered were the result of a pure tort.

(c) *Bradshaw v. Lancashire & Yorkshire R. Co.*, (1875) L. R. C. P. 189; *Daly v. Dublin, Wicklow & Wexford R. Co.*, (1892) 30 L. R. Ir. 514.

the Workmen's Compensation Acts, 1897 and 1900 (a); by the Employers' Liability Act, 1880; and by Lord Campbell's Act, 9 & 10 Vict. c. 93, which enacts that "whosoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony" (b).

"Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct" (c).

"Not more than one action shall lie for and in respect of the same subject-matter of complaint; and every such action shall be commenced within twelve calendar months after the death of such deceased person" (d).

If no such action is brought by the executor or administrator within six months after the death, then the action may be brought by and in the name of the persons for whose benefit such action would have been, if it had been brought in the name of the executor or administrator, or if, as would usually be the case with poor persons, there is no executor or administrator, then the persons for whose benefit the action would have been brought, if there had been an executor or administrator to bring it, may sue at once (e).

(a) See *post*, p. 95.

(b) s. 1.

(c) s. 2.

(d) s. 3.

(e) 27 & 28 Vict. c. 95, s. 1.

The cause of action which Lord Campbell's Act thus gives to the personal representatives differs from the cause of action which the deceased would have had if he had survived in this, that the remedy is given for the benefit of the members of the family not as a class but as individuals ; and, therefore, on the death of a person whose income arose solely from land or other invested capital, no portion of which was lost to his family by his death, the action is maintainable if in consequence of that death the mode of its distribution among the members is changed, as where the bulk of the property is settled on the eldest son (a). But on the other hand the causes of action are the same to this extent, and if the deceased in his lifetime accepted any compensation in satisfaction of his claims against the defendant, the personal representatives are debarred from bringing any action under the statute (b) ; and, similarly, if the deceased, being a workman, contracted with his employer not to claim compensation under the Employers' Liability Act for personal injuries caused by the negligence of his fellow-workmen, and he died from injuries so caused, his personal representatives are bound by his contract and cannot sue (c).

Workmen's
Compensation
Act, s. 9.

It is, however, now provided by s. 9 of the Workmen's Compensation Act, 1897, that, "Any contract existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act" (d).

For injuries done to the personal property of the deceased after his death the executor or administrator can sue, whether the injury was prior to the grant of probate or letters of administration or not, provided in the case of an executor that he have obtained probate before production of the probate

(a) *Pym v. Great Northern R. Co.*,
(1863) 4 B. & S. 396.

(b) *Read v. Great Eastern R. Co.*,
(1868) L. R. 3 Q. B. 555.

(c) *Griffiths v. Earl of Dudley*, (1882)
9 Q. B. D. 357.

(d) This Act came into operation on
July 1st, 1898.

becomes necessary (a), and in the case of an administrator that he have obtained letters before commencing the action (b). The title of executor (c), or administrator (d) when once probate or letters have been granted relates back to the date of the death, and any injury committed subsequently thereto is an injury to them.

There are three cases in which the personal representatives of a deceased may be sued for torts committed by him. The first is where he has wrongfully appropriated the property of another person and added such property or its proceeds to his own estate. But to bring a case within this exception to the general rule it is not enough that the estate of the deceased should have indirectly benefited by his tortious act; the benefit must consist in the direct acquisition of property or its proceeds. Thus if a person trespass on the land of his neighbour, and wrongfully use the roads and passages on such land for the conveyance of his own minerals, although his personal estate may have derived indirect benefit from such user the remedy for the trespass dies with the person (e). If a tenant for life "has wrongfully cut timber, the timber or its proceeds or value can be followed. But no action for waste, permissive or voluntary, as such lies against the executors of a tenant for life. By non-repairing a house, or by ploughing up an ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognise in this indirect benefit which he may have received any ground for proceedings against his executors" (f).

4. Personal representatives may be sued for value of property wrongfully added by deceased to his estate.

An action of tort lay at common law against the executors of a beneficed clerk at the suit of his successor for dilapidations of the building upon his benefice. For such remedy there has now been substituted by statute (g) an action of debt.

5. Representatives of beneficed clerk may be sued for dilapidations.

(a) Williams on Executors, Pt. i. Bk. iv. Ch. i. § ii.

(b) *Martin v. Fuller*, (1696) Comb. 371.

(c) 1 Rolle, Abr. 917, A. 2.

(d) *Tharpe v. Stallwood*, (1843) 5 M. & G. 760.

(e) *Phillips v. Homfray*, (1883) 24 Ch. D. 439.

(f) Per Bowen, L.J., *Phillips v. Homfray*, (1883) 24 C. D. p. 455.

(g) 34 & 35 Vict. c. 43; as to which see below, p. 378.

6. For torts to property committed by deceased within six months before death liability survives.

A third exception to the general rule is created by statute 3 & 4 Will. IV. c. 42, s. 2, which provides that an action may be brought against the executors or administrators of any person deceased for any injury committed by him in his lifetime to the real or personal property of another, if the injury was committed within six months of his death, and provided the action be brought within six months after the executors or administrators shall have taken upon themselves the administration of the deceased person's estate.

Assignees.

The question whether a right of action for a tort is assignable so as to entitle the assignee to sue in his own name, although always highly problematical, was not at one time the subject of an actual decision. It has, however, been held in recent cases, that the assignment of a mere right of litigation, such as accrues in the case of a legal claim to recover damages arising out of an assault, is not admissible, presumably upon the ground that such assignments would materially affect the existing laws against champerty and maintenance (a).

No doubt s. 25 of the Judicature Act, 1873, which enacts, that "any absolute assignment by writing . . . of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action," shall be effectual to transfer the legal right to such debt or chose in action, will include the assignment of a claim for compensation for damage resulting from the lawful exercise of statutory powers (b). But there are two objections in the way of holding that that section authorises the legal transfer of a right of action in tort. In the first place, although a right of action in tort is a chose in action in the widest sense of that term (c), the words "or other legal chose in action" seem to point to something *ejusdem generis* with debts, *i.e.*, causes of action arising out of contract. And secondly, as the Judicature Act is a

(a) *May v. Lane*, (1894) 64 L. J. Q. B. 237, C. A.; *Dawson v. Great Northern and City R.*, (1905) 1 K. B. 260 at p. 270, C. A.; but see *contra Trail & Sons v. Actirelskabat Dalbeuttie, Ltd.*, (1904)

6 F. 798, Ct. of Sess.

(b) *Dawson v. Great Northern and City R.*, (1905) 1 K. B. 260, C. A.

(c) *Termes de la Ley*.

mere statute of procedure, it was not intended to affect the rights of parties (a). This section cannot therefore be regarded as making that assignable in law which was not assignable in equity before, but only as enabling an assignee to sue in his own name in cases in which before the Act he could have sued in the name of his assignor. This view is supported by the decision of Wright, J., in the recent case of *Dawson v. Great Northern and City R. Co.* (b), in which it was held that a right to sue for damages in tort is not a legal chose in action within the meaning of s. 25 of the Judicature Act, 1873. There seems indeed to be but little authority in this country for the general proposition, that an assignee of a right of action in tort can sue either in his own name or in that of his assignor (c). It was, however, held in the *Park Gate Waggon Works Co., In re* (d), that claims against the directors of an insolvent company for misfeasance were capable of assignment by the official liquidators to a third party, under s. 95, subs. 3, of the Companies Act, 1862. In the case of *Cohen v. Mitchell* (e), where a cause of action for the conversion of goods was assigned, and the action was carried on in the name of the assignor, the judgment of the Court of Appeal involved the assumption that the assignment was good; but the point was not argued, and no decision was given upon it. In *Williams v. Protheroe* (f) the

Whether
cause of action
in tort assign-
able.

(a) See *per* Lord Herschell, *British South Africa Co. v. Companhia de Moçambique*, (1893) A. C. p. 628.

(b) (1904) 1 K. B. 277; this case was subsequently reversed by the Court of Appeal on another point, (1905) 1 K. B. 301.

(c) But see *Trail & Sons v. Actieselskab Dalbeattie, Ltd.*, (1904) 6 F. 798, 110 F. 100, 110 F. 101, 110 F. 102, 110 F. 103, 110 F. 104, 110 F. 105, 110 F. 106, 110 F. 107, 110 F. 108, 110 F. 109, 110 F. 110, 110 F. 111, 110 F. 112, 110 F. 113, 110 F. 114, 110 F. 115, 110 F. 116, 110 F. 117, 110 F. 118, 110 F. 119, 110 F. 120, 110 F. 121, 110 F. 122, 110 F. 123, 110 F. 124, 110 F. 125, 110 F. 126, 110 F. 127, 110 F. 128, 110 F. 129, 110 F. 130, 110 F. 131, 110 F. 132, 110 F. 133, 110 F. 134, 110 F. 135, 110 F. 136, 110 F. 137, 110 F. 138, 110 F. 139, 110 F. 140, 110 F. 141, 110 F. 142, 110 F. 143, 110 F. 144, 110 F. 145, 110 F. 146, 110 F. 147, 110 F. 148, 110 F. 149, 110 F. 150, 110 F. 151, 110 F. 152, 110 F. 153, 110 F. 154, 110 F. 155, 110 F. 156, 110 F. 157, 110 F. 158, 110 F. 159, 110 F. 160, 110 F. 161, 110 F. 162, 110 F. 163, 110 F. 164, 110 F. 165, 110 F. 166, 110 F. 167, 110 F. 168, 110 F. 169, 110 F. 170, 110 F. 171, 110 F. 172, 110 F. 173, 110 F. 174, 110 F. 175, 110 F. 176, 110 F. 177, 110 F. 178, 110 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(d) (1881) 17 Ch. D. 234, C. A.; and *Gibson v. Dudgeon*, (1881) 45 J. P. 74. The doctrine of "subrogation" appears to be recognised in colonial legislation. See *Victoria Insurance Co. v. King*, (1895) Queensland L.J. Reports, vol. vi. p. 202; affirmed, (1896) A. C. 250.

(e) (1890) 25 Q. B. D. 262. Whether the goods in that case had been converted into money by the defendant, or

still remained in his possession, did not appear. It may be that where goods have been wrongfully seized and converted by the defendant into money the cause of action may be assigned, for the plaintiff may waive the tort and sue on an implied *assumpsit* for money had and received to his use. But where the goods remain unsold in the defendant's hands, it is apprehended that the cause of action cannot be assigned. The plaintiff may indeed assign the goods, and then upon a fresh demand and refusal after the assignment the assignee may bring trover. But that was not the case in *Cohen v. Mitchell*. The cause of action there assigned was one in respect of which the action had been commenced before the date of the assignment.

(f) (1829) 5 Bing. 309.

Courts are reported to have said that there is no objection to the validity of an agreement by the vendor of an estate that the purchaser should be entitled to sue in the vendor's name for "injuries done to it previously to the purchase;" but on reference to the facts of the case, it appears that the action to which the agreement related was an action against a tenant for dilapidations arising from non-repair, which was a mere breach of contract, and actions upon contracts have always been assignable in equity (a). That case is therefore no authority for saying that a cause of action for active injury would be assignable. In *De Hoghton v. Money* (b), Turner, L.J., said that "a right to complain of a fraud is not a marketable commodity," and the same view has been expressed by Lord Abinger in *Prosser v. Edmonds* (c). But if a right of action for fraud is not assignable, then neither ought a right of action for any other tort to be so.

There seems, indeed, to be no valid reason in principle for any distinction as regards their assignability between rights of action for torts to property, and rights of action for torts to the person or reputation. The reason given by Lord Abinger in *Howard v. Crowther* (d) for holding that actions for torts of the latter class do not pass to trustees in bankruptcy, while those for torts of the former class do, namely, that in actions of the latter class the trustees would get no sufficient damages, has no application to the case of assignment of such rights of action by a solvent assignor. In the case of bankruptcy it would be unjust for the law to compulsorily deprive the injured person of a substantial claim for damages, unless by so doing it conferred a corresponding benefit upon the creditors; but in the case of a voluntary assignment by the injured person, the fact that the assignee will get but little damages, though it may present a formidable difficulty in the way of finding a purchaser, can, apart from the encouragement it would give to champertous actions, afford no good reason why the injured person should not sell his cause of action for

(a) And see *Tolhurst v. Associated Portland Cement Manufacturers and Others*, (1903) A. C. 414.

(b) (1866) L. R. 2 Ch. 164.

(c) (1835) 1 Y. & C. 481.

(d) (1841) 8 M. & W. 601. "How can they" (the trustees), he said, at p. 603. "represent his aggravated feelings?"

what it will fetch if he likes. And yet if a right of action for a purely personal tort were assignable, this strange result would follow, that the assignee would have only a cause of action determinable upon the death of another person by reason of the maxim *actio personalis moritur cum personâ*. But such a limitation has never been heard of. It is apprehended that actions for purely personal torts are not assignable, and consequently if they are not, neither are actions for torts to property (a), even though they purport to be assigned along with the injured property itself.

Assuming, however, that rights of action in tort are in general not assignable, there are two exceptions to that rule: first, a chose in action may be assigned to the Crown (b); and, secondly, rights of action of any kind which pass to a trustee in bankruptcy (including rights of actions for torts to the debtor's property) are, it appears, assignable by the trustee to a stranger (c). But as the objection to the purchase of a cause of action on the score of champerty must be wholly independent of the character of the vendor, this case may be difficult to reconcile with other authorities.

Corporations are liable to be sued for torts of all kinds committed by their agents (d), to the same extent to which an individual is liable for the torts of his agent, provided that the act or class of acts, in the course of the doing of which the torts are committed, are within the scope of the corporate powers (e).

Corporations not liable for torts outside of scope of corporate powers.

(a) See *per* Wright, J. in *Dawson v. Great Northern and City R. Co.*, (1904) 1 K. B. 277, and Park, J. in *Stanley v. Jones*, (1831) 7 Bing., p. 375, *arguendo* seems to have suggested otherwise—*sed quære?*

(b) Co. Litt. 232 b, Hargrave and Butler's note.

(c) *Secar v. Lawson*, (1880) 15 Ch. D. 426. There the action was in the name of the trustee. *Quære* whether the assignee could have sued in his own name. The distinction between the right of an assignee to sue in his own name and his right to sue in the name of the assignor may be very material.

See on this point *Western Bank of Scotland v. Addie*, (1867) L. R. 1 H. L. Sco. Ap. 145, at p. 166.

(d) Where the Corporation is a local authority an action for damages must be commenced within six months (*Casey v. Bermondsey Borough Council*, (1903) 20 T. L. R. 2).

(e) To fix a corporation with liability for the acts of its agents, two conditions must be fulfilled; 1st, the act must have been within the scope of the agent's employment; 2nd, that employment must have been within the scope of the corporate powers. As to the former, see below, pp. 75 *sqq.*

What classes of acts are within the scope of the powers of a particular corporation, and what are without it, it is frequently a matter of very great difficulty to determine. At what point a tortious act ceases to be a mere excess in the exercise of the corporate powers, and becomes something altogether outside the scope of those powers, is necessarily a question of degree; just as, in the analogous case of principal and agent, it is a question of degree whether a particular class of acts is within or without the scope of the agent's employment (a).

In *Poulton v. London and South Western R. Co.* (b) not only was it held that no authority was to be implied from a railway company to its station-master to apprehend a person travelling on their railway for non-payment of the carriage of goods, but Blackburn, J., went further and expressed an opinion that the apprehension of a person for such a reason was outside the scope of the corporate powers, and that consequently even if the station-master had been given express authority to arrest under such circumstances, the company would not have been liable (c). In *Mill v. Hawker* (d) a resolution passed by a highway board, directing their surveyor to remove an obstruction placed across a path alleged to be a public highway, was held by Pigott and Cleasby, BB., Kelly, C.B., dissenting, to be outside the scope of the board's corporate powers. This case afterwards went to the Exchequer Chamber (e), but no decision was given on this point, though the members of the Court intimated that there was considerable difference of opinion between them upon it.

Torts within
scope of
corporate
powers.

But assuming that the business, in the course of which the tort is committed by the agent, is within the scope of the corporate powers, as well as within the scope of the agent's employment, it matters not what the nature of the tort is, the corporation will be liable even though it be one involving fraud (f) or malice (g). It was formerly thought that a corporation, being

(a) See *Ruben and Another v. Great Fingall Consolidated and Others*, (1904) 2 K. B. 712.

(b) (1867) L. R. 2 Q. B. 534.

(c) p. 540.

(d) (1874) L. R. 9 Ex. 309.

(e) (1875) L. R. 10 Ex. 92.

(f) *Barwick v. English Joint Stock Bank*, (1867) L. R. 2 Ex. 259.

(g) *Citizens' Life Assurance Co. v. Brown*, (1904) A. C. 423; *Whitfield v. South Eastern R. Co.*, (1858) E. B. & E.

incapable in its corporate character of a malicious intention, could not be liable to an action in which it was necessary to prove actual malice, such as an action for malicious prosecution (a), or for libel published on a privileged occasion, or for slander of title, but the better and indeed conclusive opinion at the present day is that it can (b); it having been decided by the Judicial Committee of the Privy Council in the recent case of *The Citizens' Life Assurance v. Brown*, that a corporation is liable to an action for malicious libel, when such libel was published by its servant acting in the course of his employment. And this rule applies even though the servant may have had no actual authority, either express or implied, to issue the libel complained of (c).

To the general rule, however, that corporations may be liable to be sued for torts of all kinds there is possibly one exception; it may be that a corporation practically cannot be held responsible

115; *Green v. London General Omnibus Co.*, (1859) 7 C. B. N. S. 290; *Edwards v. Midland R. Co.*, (1880) 6 Q. B. D. 287.

(a) *Stevens v. Midland Counties R. Co.*, (1854) 10 Ex. 352.

(b) *Cornford v. Carlton Bank*, (1900) 1 Q. B. 23, C. A. It is true that the point was not expressly decided by the Court of Appeal in that case, the decision in *Cornford v. Carlton Bank* turning on another point. And in *Nerill v. Fine Arts and General Insurance Co.*, (1895) 2 Q. B. 156, where the action was for a libel published on a privileged occasion, but there was no evidence of actual malice on the part of the agent who published it, the Court of Appeal left open the question whether, if such actual malice on the part of the agent had been proved, that would have been sufficient to charge the corporation. On the other hand, in *Edwards v. Midland R. Co.*, (1880) 6 Q. B. D. 287, Fry, J., refused to follow *Stevens v. Midland Counties R. Co.*, (1854) 10 Ex. 352, and held that an action for malicious prosecution would lie against a corporation; and in *Bank of New South Wales v. Owston*, (1879) 4 App. Cas. 270, which was also an action for malicious prosecution, counsel

of the highest eminence abandoned the old doctrine as untenable. Moreover, if the decision in *Barwick v. English Joint Stock Bank*, (1867) L. R. 2 Ex. 259, that a corporation may be responsible for the fraud of their agent, was correct, as Lord Selborne in *Houldsworth v. City of Glasgow Bank*, (1880) 5 App. Cas. p. 326, conceded, it is difficult to see how any different view could prevail in the case of an action founded upon malice. For fraud is just as much a state of mind as is malice. The real reason why a corporation is responsible for the fraud of its agent is not that the fraud is imputable to the corporation itself, for that it cannot be; it rests simply on the principle of *respondeat superior*. "It is," as Lord Selborne said in *Houldsworth Case* (p. 326), "a principle, not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual." And the same principle must equally apply to malicious wrongs.

(c) (1904) A. C. 423; disapproving *Abrath v. North Eastern R.*, (1883-6) 11 App. Cas. 247.

for a fraudulent misrepresentation as to the credit of a third person, owing to the difficulty of complying with the terms of Lord Tenterden's Act, which requires that the representation should be in writing, *personally* signed by the party to be charged (a).

Where
corporation
liable for
torts of
corporators.

But although a tort committed by an agent in the course of a business within the scope of the corporate powers will render the corporation responsible, a similar act done not by an agent but by the corporators themselves will not necessarily render the corporation liable. For on the one hand the sum of the individual corporators, even when acting in a matter within the corporate powers, is not identical with the corporation itself, nor on the other hand do they stand to the corporation in the same relation as an ordinary agent stands to his principal. If an ordinary agent commits a tort of such a kind as to render his principal liable, the agent will be liable also; their liabilities are cumulative. But it is otherwise with torts committed directly by corporators: their liability and that of their corporation is in the alternative; they cannot both be liable (b).

And if a plaintiff elect to sue the agent and not the corporation, he must abide by such election, and is estopped from afterwards suing the corporation in respect of the same matter (c).

If the corporators, acting in their corporate capacity in a matter within the scope of their corporate powers, under a *bona fide* mistake of fact order an act to be done which turns out to be tortious, the corporation will be liable and the corporators will not (d). But if the corporators commit a wilful tort, whether fraudulent or malicious, as for instance where they publish a

(a) See this subject discussed below, in Ch. XVI. In *Houldsworth v. City of Glasgow Bank*, (1880) 5 App. Cas. p. 340, Lord Blackburn treated it as an open question, whether an action of deceit could be brought against a company under any circumstances for damage caused by fraud of the directors, inducing the plaintiff to enter into a contract with the company, while the contract remained unrescinded, but the other law lords do not seem to have

assented to this view.

(b) *Harman v. Tappenden*, (1801) 1 East, 555; *Rex v. Windham*, *ibid.* cited by Lord Kenyon, p. 561; *Mill v. Haucker*, (1874) L. R. 9 Ex. 309.

(c) *Cross & Co. v. Matthews and Wallace*, (1904) 91 L. T. 500.

(d) *Per Kelly, C.B., Mill v. Haucker* (1874) L. R. 9 Ex. p. 322. This was not disputed by the other members of the Court.

libel knowing it to be such (a), inasmuch as it would be unjust that they should escape liability by purporting to do it under the cloak of their corporate character, they must be held liable, from which it follows that the corporation will not be so. And this rule will presumably hold good even though the corporators may commit the tort, not for their own private ends, but with the object of furthering the interests of the corporation.

As a general rule a corporation is liable to its own corporators for the torts of its agents to the same extent as it is liable to strangers; it is of course no defence to an action against a railway company for personal injuries to plead that the plaintiff was a shareholder. But to this rule there is an exception; an action of deceit will not lie against a company at the suit of a shareholder, while the contract of partnership remains unrescinded, for damage caused by the fraud of the directors in inducing him to take shares (b). But it is apprehended that this exception does not extend to the case of fraud inducing a contract, between the corporator and the corporation, of any other description than that of a contract to take shares. The fact that the plaintiff in such case may have to contribute rateably towards the payment of his own claim will not affect the validity of his claim (c).

Corporation in general liable for torts to its own corporators.

Where several persons join in committing a tort, "each is responsible for the injury sustained by their common act" (d). If one of several joint tort-feasors be sued alone it matters not that he did but a small part of the damage, he is liable for the whole. Where a tort is joint there can be only one action, a recovery of judgment against one of the several wrong-doers being a bar to any further action against the others (e). It is material, therefore, to enquire under what circumstances a tort can be said to be joint.

Joint tort-feasors: extent of their liability.

Persons are said to be joint tort-feasors when their respective

Definition of joint tort-feasor.

(a) *Rex v. Watson*, (1788) 2 T. R. 199.

5 App. Cas. p. 329.

(b) *Houldsworth v. City of Glasgow Bank*, (1880) 5 App. Cas. 317. See in this connection certain dicta of Lord Cottenham in *Vigers v. Pike*, (1842) 8 Cl. & Fin. 562, at pp. 646 to 649.

(d) *Per Rolfe, B., Clark v. Newsam*, (1847) 1 Ex. p. 140; *Mileham v. Corporation of Marylebone*, (1903) 67 J. P. 110.

(c) See *per* Lord Selborne in *Houldsworth v. City of Glasgow Bank*, (1880)

(e) *Brinsmead v. Harrison*, (1871-2) L. R. 6 C. P. 584; L. R. 7 C. P. 547.

shares in the commission of the tort are done in furtherance of a common design. "All persons in trespass who aid or counsel, direct, or join, are joint trespassers" (a). If one person employs another to commit a tort on his behalf, the principal and the agent are joint tort-feasors, and recovery of judgment against the principal is a bar to an action against the agent (b). But mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action towards a common end. In one case, indeed, Lord Ellenborough, at *nisi prius*, ruled that where a huntsman rode after his hounds over the plaintiff's lands, he was liable for the whole damage done by the concourse of people who followed him, on the ground that the parties were co-trespassers (c). The ruling can hardly be supported on that ground, for it seems to be based on a mistaken notion as to the object of fox-hunting, though it may possibly be supported on the principle of *Clark v. Chambers* (d), that a person who does an unlawful act, the probable consequence of which is that third persons will negligently do something injurious to the plaintiff, is liable to the plaintiff for the injury done by such third persons. It must not be inferred from Lord Ellenborough's ruling that wherever persons independently commit similar trespasses at the same time in the same place, they are co-trespassers within the meaning of the rule. Indeed it has been expressly held that one member of a hunt, not being the master or huntsman, is not liable for damage done by the horses of the other members of the hunt (e).

Whether the several persons who join in the unauthorised performance of a play are joint tort-feasors, so that recovery of judgment against one for the 40s. penalty given by 3 & 4 Will. IV. c. 15, discharges the others, was left open by the Court of Appeal in *Duck v. Mayeu* (f). But probably all that the Court meant was, that they doubted whether the 40s. was given as damages by way of compensation, or whether it was inflicted as a penalty

(a) *Per* Tindal, C.J., *Petrie v. Lamont*, (1842) Car. & Marsh. p. 96.

(b) *Brinsmead v. Harrison*, (1871-2) L. R. 6 C. P. 584; L. R. 7 C. P. 547.

(c) *Hume v. Oldacre*, (1816) 1 Stark. p. 352.

(d) (1878) 3 Q. B. D. 327. See below. pp. 144-145.

(e) *Paget v. Birkbeck*, (1863) 3 F. & F. 683.

(f) (1892) 2 Q. B. 511.

in the strict sense of the term, in which case the unauthorised performance could not strictly be regarded as a tort at all (a).

The independent tortious acts of several persons, even though contributing to produce but one joint damage, will not constitute a joint tort. Thus, if a person wrongfully leave unfenced a pit, which he has dug by the side of a high road, and another wrongfully does some act in the road whereby horses passing along it take fright and swerve into the pit, or if one person negligently allows an escape of gas which another person negligently causes to explode by taking a lighted candle into the room, though each party will be liable for the whole damage done, they will not be joint tort-feasors.

Thus in *Thompson v. London County Council* (b) where the plaintiff having brought an action against the defendants for excavating near his house and withdrawing the support, whereby it was damaged, sought to add a water company as co-defendants upon the ground that they contributed to the damage by negligently allowing water to escape from their main, the Court refused to allow the water company to be joined, being of opinion that the facts did not constitute a joint tort. So, where two railway companies, which had parcel offices on opposite sides of the plaintiff's shop, caused their carts to stand in the street in front of their respective offices for an unreasonable length of time, and by their combined acts in so doing prevented all access to the plaintiff's premises by vehicles and thereby injured him in his trade, though the acts of either company alone would not have had that effect, it was held that the two companies could not be made co-defendants in an action to recover damages for the obstruction, but that each must be sued separately (c).

It is apprehended that torts of all kinds may be joint, and that in this respect libel and slander (d) form no exception. If the writer of a libellous paragraph send it to the publisher of a

(a) In the earlier case of *Adams v. Batley*, (1887) 18 Q. B. D. 625, the Court of Appeal had held that the 40s. was in the nature of damages, with the consequence that the plaintiff might administer interrogatories. It may be that the Court in *Duck v. Mayeu*

doubted the correctness of that decision.

(b) (1899) 1 Q. B. 841, C. A.

(c) *Sadler v. Great Western R. Co.*, (1896) A. C. 450.

(d) *E.g.*, a defamatory chorus of a song.

newspaper for insertion, he will be jointly liable with the publisher for its publication in the newspaper, though possibly he may also be severally liable in respect of the publication to the publisher. In an old case (a) it was held that slander cannot be joint any more than the tongues of the slanderers can be said to be one, a line of reasoning which would equally prevent the possibility of trespasses being joint.

Contribution
between joint
tort-feasors.

As a general rule there can be no contribution between joint tort-feasors, that is to say, if an action being brought for a joint tort, and one wrong-doer pay the whole damages recovered, he cannot recover over a proportion of the damages from the others (b).

Where several persons combine to do some act which at the time of its commission they know to be unlawful, as where they combine to commit an assault or to publish a libel, no promise of contribution or of indemnity can be implied. For any express promise to pay would be void as founded on an illegal consideration, and for the same reason any promise to be implied from the conduct of the parties would, of course, be equally void. But where the party seeking contribution from the other wrong-doers did not, at the time of doing the act, know it to be unlawful, the objection on the score of illegality does not hold good (c). But even in those cases in which the joint wrong-doers did not intend to do anything unlawful, the mere fact that the damages have been levied wholly against one does not of itself give rise to an obligation upon the others to contribute. It might well be considered reasonable that as in the case of joint debtors such an obligation should exist, but it is settled law that it does not. The rule of *Merryweather v. Nixan*, which in this respect is anomalous and "does not appear to be founded on any principle of justice, or equity, or even of public policy" (d), has been too long the law of the land to be now open to question. In order to give rise to an implied promise of indemnity or con-

(a) *Chamberlaine v. Willmore*, (1621) Palm. 313.

(b) *Merryweather v. Nixan*, (1799) 8 T. R. 186.

(c) *Adamson v. Jarvis*, (1827) 4 Bing. 66; *Betts v. Gibbons*, (1834) 2

A. & E. 57; and *per* Lord Herschell in *Palmer v. Wick and Pulteney Trench Steam Shipping Co.*, (1894) A. C. at p. 324.

(d) See *per* Lord Herschell (1894) A. C. at p. 324.

tribution there must be the relationship of principal and agent between the tort-feasors, or, at all events, a request by one party to the other to do the act complained of (a).

Upon the rule, however, that there can be no contribution where the party seeking it knew at the time of doing the act that it was unlawful, an exception has been engrafted by the Directors Liability Act, 1890 (53 & 54 Vict. c. 64). By s. 3 of that Act directors, promoters, and persons authorising the issue of a prospectus are to be liable to subscribers for loss sustained by reason of any untrue statement in the prospectus, subject to certain limitations. And by s. 5 every person who "has become liable to make any payment under the provisions of this Act shall be entitled to recover contribution, as in cases of contract, from any other person who if sued separately would have been liable to make the same payment." Persons who fraudulently issue a prospectus which they know to be false are no doubt liable at common law, but that fact does not exclude their being also liable under the provisions of the Act, and they are consequently entitled to the relief afforded by the section (b).

Where a tort was committed to some subject-matter in which several persons were jointly interested, non-joinder of any of the parties so interested as plaintiffs was formerly matter for a plea in abatement, but if no such plea was raised, the parties who sued were entitled to recover damages in proportion to their interests in the subject-matter. Thus one of several joint owners of a chattel might recover for the injury to his share (c), leaving his co-owners to recover in another action for the injury to their shares (d).

Pleas of abatement are now abolished (e), and the present mode of objecting to non-joinder is by application at chambers to have the necessary parties added (f), but if no such application be made or, being made, is refused, the old rule will presumably

Joint
plaintiff in
tort.

(a) As to the circumstances under which a request will raise an implication of the promise, see *Sheffield Corporation v. Barclay*, (1903) 2 K. B. 580 (reversed (1905) A. C. 392) where all the earlier authorities are considered.

(b) *Gerson v. Simpson*, (1903) 2 K. B. 171.

(c) *Bloxam v. Hubbard*, (1804) 5 East, 407; *Addison v. Overend*, (1796) 6 T. R. 766.

(d) *Sedgeworth v. Overend*, (1797) 7 T. R. 279. See below, p. 185.

(e) Ord. XXI. rule 20.

(f) Ord. XVI. rule 11.

still hold good, that the party suing may recover in proportion to his interest and no more.

In the case of libel on a member of a firm there may well be a double injury, one to the reputation of the individual member (*a*), and another to the reputation of the firm (*b*), for which distinct actions will lie; and presumably the individual member, after recovering in an action for the injury to himself personally, may sue alone in a second action for the damage to the firm in respect of his interest in it.

Principal and Agent.

Not only is a person liable for torts committed by himself, but he is also, subject to certain conditions, liable for torts committed by his agents. If indeed the tort of the agent has been either primarily authorised or subsequently ratified by the principal, it is the act of the principal himself, and no difficulty as to his liability arises (*c*). Moreover, under certain circumstances, the principal, whether an individual or a corporate body, will be liable even for the unauthorised torts of his agents (*d*).

Nor will the fact that the act complained of, although within the scope of the agent's employment, was done in the interests of the agent himself and not of his principal exonerate the latter from liability to third parties (*e*).

And this rule applies even in cases where the terms of the written authority under which the agent acted were unknown to the third party at the time when the act complained of was committed (*f*).

Two classes of agents—servants and contractors.

In considering what those circumstances are, which render a principal liable for the unauthorised torts of his agent, it is necessary in the first place to distinguish between those cases in which the principal, by the terms of the employment, express or understood, reserves to himself a power of controlling the agent in the execution of the work that he is employed to do, and of dismissing him for disobedience of orders, and those cases in which

(*a*) *Harrison v. Bevington*, (1838) 8 C. & P. 708. see above, p. 60.

(*b*) *Forster v. Lawson*, (1826) 3 Bing. 452.

(*c*) *Curter v. St. Mary Abbott's, Kensington*, (1900) 64 J. P. 548, C. A. And

(*d*) *Holliday v. National Telephone Co.*, (1899) 2 Q. B. 392, C. A.

(*e*) *Hambro v. Burnand & Others*, (1904) 2 K. B. 10, C. A.

(*f*) S. C.

the principal does not reserve to himself any such power. Agents of the latter class are generally spoken of as independent contractors; though even when an independent contractor is employed, recent decisions seem to show that a principal cannot always divest himself of responsibility towards third parties by proving, in evidence, that the actual tort-feasor was a person over whom he had reserved no control (a).

Those agents of the former class whose employment is more or less continuous are usually styled servants, while those whose employment is intermittent or confined to a particular occasion, are usually called by the generic name of agents. Between servants, however, and other agents over whom the employer reserves control, there is no distinction in point of law; the employer is liable for the torts of the one to the same extent and subject to the same conditions as he is liable for the torts of the other. For the sake of brevity, therefore, it may be convenient to speak of all those classes of agents over whom the employer reserves control under the name of servants, as in contradistinction to contractors over whom such control is not reserved (b).

In every case the question whether an agent is employed as a servant or as a contractor is a question of intention, and therefore a question of fact. Where the agent is one "who is recognised by the law as exercising a distinct calling" (c) involving for its exercise a certain degree of skill and experience, there is a strong presumption that the employer did not reserve any control over one who presumably knows much better how to do the work than himself, and therefore if one employ a licensed drover to

(a) *The Snark*, (1899) P. 74; 80 L. T. 25; *Hill v. Tottenham Urban Council*, (1898) 79 L. T. 495; *Mileham v. St. Marylebone Borough Council*, (1903) 1 L. G. R. 412.

(b) The definition above given of an independent contractor would undoubtedly include a solicitor, for a lay client obviously does not usually reserve to himself any power of controlling the solicitor in the conduct of the business which he is employed to do, and yet it has been held that where a solicitor of a

judgment creditor negligently directed the sheriff to take the goods of the wrong person in execution, the client was liable for the act of the solicitor (*Jarmain v. Hooper*, (1843) 6 M. & G. 827). But that decision must be regarded as anomalous. If such a question were to arise for the first time at the present day, it would probably be decided otherwise. See the judgment of Jessel, M.R., in *Smith v. Keal*, (1882) 9 Q. B. D. 340.

(c) *Per Lord Denman, Milligan v. Wedge*, (1840) 12 A. & E. p. 741.

drive a bullock for him through the streets the drover will not be the servant of the party employing him (a), by reason of the contractor, under such or cognate circumstances, choosing alike the method in which the work is to be done and the persons who are to do it; though, as before stated, the mere fact of a principal employing an independent person does not necessarily relieve him from personal liability for the tortious acts of the persons so employed (b). Thus if an owner of property employ an independent contractor to rebuild his house, and the builder's workmen so negligently perform their duty as to injure the property of an adjoining owner, the building proprietor, as well as the builder, is responsible to the aggrieved third party for the tortious act (c). On the other hand, where the agent is a person not exercising an independent employment, but is directly under the personal control or supervision of his employer, the inference is that he is employed as a servant and not as a contractor, although he may be specially retained as a person skilled in the particular duty or office for which he is engaged. And this presumption is strengthened when from the nature of the employment it may be reasonably supposed that the person employed has no higher degree of skill or experience than the employer, as where an ordinary labourer is employed to clean out a drain, the inference under such circumstances being that he is employed as a servant and not as a contractor (d).

Essentials of
relationship
of master
and servant.

To constitute the relationship of master and servant for this purpose there is no necessity for any consideration for the service. If a person employ another to do some act on his behalf gratuitously, as where the owner of a carriage gets a friend to drive it for him (e), the employer will be liable for the manner in which the act is done, to the same extent to which he would be so liable if the agent were paid. If A. lends his servant to B. for a job, the servant becomes *ad hoc* the servant of B., though B. pays nothing for his services (f). The question is whether

(a) *Per Coleridge, J., Milligan v. Wedge*, (1840) 12 A. & E. p. 742.

(b) *Duke v. Courage*, (1882) 46 J. P. 453.

(c) *Dalton v. Angus*, (1881) 6 App. Cas. 740; *Hughes v. Percival*, (1813) 8 App. Cas. 443.

(d) *Sadler v. Henlock*, (1855) 4 E. & B.

(e) *Wheatley v. Patrick*, (1837) 2 M. & W. 650.

(f) *Donoran v. Laing Wharton & Down Construction Syndicate*, (1892) 1 Q. B. 629.

the act is done for the employer (a). Again, it does not affect the existence of the relationship that the employer is not allowed by law to do the work for himself, but is compelled to employ an agent of a particular class to do it for him, provided the employer is allowed the power of controlling and dismissing the agent, and provided the class from which the agent is to be taken is sufficiently large to give the employer a practical power of selection. Thus the statutory obligation which rests upon owners of barges on the Thames to employ at least one licensed waterman aboard each craft to navigate her, does not prevent the watermen so employed from being the servants of the owners, there being several thousand licensed watermen to select from, and the owner having a power of control and dismissal (b). But where the class is so limited that the employer has practically no power of selection he is not responsible for the negligence of the person employed. It was on this ground that at common law, prior to the passing of the Pilot or Merchant Shipping Acts, the master of a ship was in general not liable for the misconduct of a pilot employed by him in a compulsory pilotage district (c).

Although in general the test whether a person stands to another in the relation of master to servant is whether he had the power of controlling his acts and dismissing him for disobedience, it is otherwise where that power of control is not original but delegated from a superior. The fact of a head servant having the power of selecting and dismissing the under servants does not make them his servants, for in employing them he acts merely as agent for his master, and he pays them with his master's money (d). For the same reason "superior public officers, such

(a) It has indeed been suggested by Cave, J., in *Coupe v. Maddick*, (1891) 2 Q. B. p. 415, that if one of two partners drives their horse and cart for the purposes of the partnership business, and in so doing negligently injures a person passing along the highway, the partner so driving would be alone responsible. But for this proposition he cites no authority. The cases of *Ashworth v. Saxwix*, (1861) 3 E. & E. 701, and *Meilors v. Shaw*, (1861) 1 B. & S. 437, seem to be directly opposed to his

view.

(b) *Martin v. Temperley*, (1843) 4 Q. B. 298.

(c) *The Halley*, (1868) L. R. 2 P. C. p. 201. The exemption of the master from liability in such case is now regulated by statute 57 & 58 Vict. c. 60, s. 633.

(d) *Stone v. Cartwright*, (1795) 6 T. R. 411. So too with agents employed by directors of a company (*Weir v. Bell*, (1878) 3 Ex. D. 238).

as the Postmaster-General (*a*), the Lords Commissioners of the Treasury, the Commissioners of Customs and Excise, the Auditors of the Exchequer, and the like, are not responsible for the negligence or misconduct of inferior officers in their several departments, though the superior officers appointed them and had the power of dismissing them" (*b*), for such inferiors are the servants not of their superior officers but of the Crown, and are paid with the money of the Crown.

Club servants. Whether the relationship of master and servant exists between the members of an ordinary club and the club servants has apparently never been decided. It has indeed been suggested from the bench that such club servants are the servants not of the members but of the committee (*c*). But the correctness of that view may be doubted, for the committee would seem to be merely the agents of the members to appoint the servants on their behalf, while the servants' services are rendered for the benefit not of the committee but of the members, and are paid out of the funds not of the committee but of the club. The fact that an individual member cannot dismiss a servant from the club's employment does not conclude the question; for neither can one of a firm of partners dismiss a servant of the partnership against the will of his co-partners. It may be that for any act of negligence done by the servant the committee would be liable, for they are also members of the club, but it is submitted that they would only be liable in the latter character. Members of a club no doubt are not liable in contract for goods supplied to a club on the orders of the committee, but that is because the committee, although they are the agents of the members, have no authority to pledge their principal's credit (*d*); but this cannot affect the question of their liability in tort. The point, however, must be regarded as very doubtful (*e*); although it was held in the case of

(*a*) *Bainbridge v. The Postmaster General & Crane*, (1905) 22 T. L. R. 70, C. A. p. 42.

(*b*) *Per Erle, C.J., Tobin v. Queen*, (1864) 16 C. B. N. S. p. 351. See above, p. 41.

(*c*) *Per Rigby, L.J.*, (1895) 2 Q. B.

(*d*) *Fleming v. Hector*, (1836) 2 M. & W. 172.

(*e*) A club is not a private house for the purposes of the Public Health (London) Act, 1891 (*McNair v. Baker*, (1904) 1 K. B. 208).

Broun v. Lewis (a), that the committee of a club, and not the members generally, are the persons primarily liable in tort.

It has been held that the district delegate of a trades union is not the servant of the members of the union although elected by their votes, but that decision turned upon the peculiar position of a district delegate, who is rather in the nature of a protector and adviser than of an inferior (b). But as the funds of a trades union have been held liable for the amount of damages recovered, against the trustees of such union, in an action for a libel contained in a newspaper carried on in the interests of the members, the relation existing between the ordinary members of such an association, and its higher officials is probably that of principal and agent (c).

Trades Union
officials.

It appears probable that the funds of a *Trade Union qua* Trade Union can only legally be employed for the furtherance of one or other of the objects specifically mentioned in section 16 of the Trade Union Act Amendment Act of 1876 (d).

The relationship between the proprietors and drivers of cabs in the metropolis is at common law clearly not that of master and servant in those cases in which the ordinary practice is followed of the driver paying a fixed daily sum for the use of the cab and horse, or the cab alone, as the case may be; it is merely that of bailor and bailee. And it was formerly thought that the provisions of the London Hackney Carriage Act, by which the proprietor is required to retain possession of the driver's licence, and is made liable to penalties for the misconduct of the driver, did not establish an involuntary relationship of master and servant, in those cases, at all events, in which, the horse and harness being the property of the driver, the proprietor supplied only the cab (e). It has now, however, been settled that under that Act, so far as the public is concerned, the *registered proprietor of a hackney carriage* is in all cases as responsible for the acts of the driver whilst he is plying for hire as if the

Cab drivers.

(a) (1896) 12 T. L. R. 455.

(d) 39 & 40 Vict. c. 22; but see

(b) *Flood v. Jackson*, (1895) 2 Q. B. 21.

Swaine v. Wilson, (1889) 24 Q. B. D. 252, C. A.

(c) *Linaker v. Pilcher*, (1901) 84 L. T. 421; 70 L. J. K. B. 396; 49 W. R. 413.

(e) *King v. Spurr*, (1881) 8 Q. B. D. 104.

act complained of was done in the course of employment (a). Thus, where a constable employed by a railway company to keep order in their station was given instructions not to arrest persons committing assaults except for the purpose of putting an end to the affray, and he arrested a person whom he believed to have been guilty of assault but after the affray was over, it was held that his having acted in breach of his instructions exonerated the company (b). But on the other hand, where a passenger alighted from a train at the station before that to which his ticket was issued, and the station-master, upon his refusal to give up his ticket, locked the only door of exit, although the passenger tendered his name and address, it was held that the company was liable for the act of their officer, upon the ground that locking the door was a ministerial act within the scope of his authority (c).

These cases well illustrate the difficulty which frequently exists in saying whether a particular tortious act was merely a mode of doing something authorised, or was altogether unconnected with the subject-matter of the authority. It is impossible to draw any hard-and-fast line between the classes of acts which are within and those which are without the scope of the employment, or to say where the one ends and the other begins. It is in every case a question of degree, and therefore one of fact; and all that can be done in the way of elucidating the matter is to give illustrations. "A footman might think it for the interest of his master to drive the coach, but no one could say it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses" (d). Where a housemaid whose duty it was to light a fire, finding that the fire would not burn and believing the cause to be that the chimney was

(a) A bailee is not liable to a bailor for the tortious act of his servant, when the tort was committed under circumstances outside the scope of his employment, *Sanderson v. Collins*, (1904) 1 K. B. 628, C. A.

(b) *Walker v. South Eastern R. Co.*, (1870) L. R. 5 C. P. 640; *Knight v. North Metropolitan Tramways Co.*, (1898) 78 L. T. 227; *Byrne v. London-*

derry Tramways Co., (1902) 2 Ir. R. 457, C. A.

(c) *Farry v. Great Northern R. Co.*, (1898) 2 Ir. R. 352.

(d) Per Blackburn, J., *Limpus v. London General Omnibus Co.*, (1862) 1 H. & C. p. 542; *Beard v. London General Omnibus Co.*, (1900) 2 Q. B. 530.

choked with soot, with the object of clearing it, but with the knowledge that it was no part of her duty to clean the chimneys, lit some straw in it and thereby set the house on fire and did damage, her master was held not responsible (a). Where a solicitor's clerk, who had been forbidden to use his master's lavatory, in disobedience of orders, did so, and left the tap running, whereby damage occurred to the plaintiff, who occupied the floor below, the act of the clerk was considered not sufficiently incident to the ordinary duties of his employment to render his master liable (b). Where a servant who had orders from his master to distrain any cattle he might find damage feasant on his master's land, wilfully drove some from off a highway into his master's field and then distrained them there, the master was held not liable (c); the act was clearly unconnected with the protection of the master's interests. So too, where a broker employed by a water company to distrain the plaintiff's goods for arrears of water rate, whilst engaged in so distraining committed an unprovoked assault upon the plaintiff, such assault was held to be not a mere excess, but an independent wrong wholly unconnected with the carrying out of his orders, and therefore his employers were not responsible (d).

And where a jobmaster supplied a brougham, horse, and coachman to a travelling silversmith, and the coachman, who was an accomplice of thieves, drove the carriage to a place where the greater part of the samples were stolen, it was held that the jobmaster was not responsible, the criminal act of the servant not having been done within the scope of his employment (e). But on the other hand, a jobmaster, letting out a carriage and driver to a travelling jeweller, was held liable for the loss of jewels, left by the hirer in the carriage in charge of the driver, upon the ground that it was the duty of the defendant to provide a coachman, who should take ordinary care of the vehicle during the temporary absence of the traveller (f), and that the lack of such

Criminal act
of servant.

Liability of
jobmaster.

(a) *McKenzie v. McLeod*, (1834) 10 Bing. 385.

(b) *Stevens v. Woodward*, (1881) 6 Q. B. D. 318.

(c) *Lyons v. Martin*, (1838) 8 A. & E. 512.

(d) *Richards v. West Middlesex Waterworks Co.*, (1885) 15 Q. B. D. 660.

(e) *Cheshire v. Bailey*, (1905) 1 K. B. 237, C. A.

(f) *Abraham v. Bullock*, (1902) 86 L. T. 796, C. A.

Assault by
servant.

care was negligence within the scope of the employment. Again, in *Dyer v. Munday* (a), where a servant while engaged in recovering his master's property was resisted, and committed the assault (apparently a slight one) for the purpose of overcoming that resistance, his master was held liable. But it is not every assault committed by a servant for the protection of his master's property that can be treated as within the scope of his employment. Whether it is so or not is a question of degree. In *Kinsella v. Hamilton* (b) one of a party employed to effect a distress, finding that the execution of the distress was forcibly resisted, fired at and killed one of the persons offering the resistance. In an action under Lord Campbell's Act, against the person who authorised the distress, it was held, that, as the taking of life cannot be justified for the protection of property, the firing, although the distress could have not been effected without it, was not so incident to the levying of the distress as to render the defendant answerable for the consequences. The authority of an omnibus conductor to superintend the conduct of the omnibus generally includes an authority to remove any passenger who in his judgment has misconducted himself, and for any excess of violence on the part of the conductor in removing such passenger the proprietors of the omnibus will be responsible (c). But such delegated authority does not extend to giving a passenger into custody, upon a charge of tendering bad money (d).

The tort must
be incidental
to the doing
of something
really
authorised.

The master's liability for the unauthorised torts of his servants is, as stated above, limited to unauthorised modes of doing authorised acts; unless the act complained of is directly incidental to the doing of something which is really authorised the master is not liable. It is, therefore, material in every case to inquire what acts the master has authorised, what acts, that is to say, the master really intends the servant to have authority to do.

When the act complained of is directly incidental to the doing of something *expressly* authorised, no difficulty arises on this point, except perhaps in cases in which the master is not an

(a) (1895) 1 Q. B. 742.

(b) (1890) 26 L. R. 1r. 671.

(c) *Seymour v. Greenwood*, (1861) 7 H. & N. 355. See too *Bayley, Man-*

chester, Sheffield, &c., R. Co., (1873) L. R. 8 C. P. 148.

(d) *Knight v. North Metropolitan Tramways Co.*, (1898) 78 L. T. 227.

individual but a corporation (a). But the authority which the master really intends the servant to have is rarely defined in express terms ; it is generally left either partially or wholly to be *inferred* from the surrounding circumstances, and the nature of the business in which the servant is employed.

In considering what acts the servant has an inferred authority to do, it seems that no intention is to be inferred on the part of the master to authorise the doing of any acts which he might not lawfully do himself. Thus, railway companies having no statutory power to arrest persons travelling on their lines for non-payment of the fares of animals in their charge, where a station-master arrested a passenger on the assumption that he had wrongfully taken a horse by train without paying its fare, it was held that no authority to the station-master to arrest under such circumstances could be inferred, and, there being no evidence of any express authority to do so by regulation or otherwise, the company were held not responsible for the arrest (b).

No doubt a master cannot lawfully commit a fraud, and yet under certain circumstances he may be liable for it when committed by his servant, but in such case the ground of his liability is not that there is any inference of authority to the servant to commit the fraud, but that the servant has authority to conduct the transaction lawful in itself, in the course of which the fraud is committed, and that the fraud is merely an improper mode of conducting it (c).

Where a servant has authority to do a particular act upon a particular occasion arising, and the act is of a kind which, if it is to be done at all, must be done immediately upon the arising of the occasion, the servant will, in the absence of the master or of any superior servant to whom he can refer the question, have an implied authority to exercise his judgment and determine as a preliminary to the doing of the act whether the occasion for doing it has arisen ; and if in the exercise of that judgment the servant makes a mistake the master will be responsible for it, or, in the words of, Wright, J. (d) : “ In cases of sudden emergency, a

Implied authority to exercise discretion in cases of necessity.

(a) As to which see above, p. 59.

306 ; *Heiton v. McSweeney*, (1905) 2 Ir.

(b) *Poulton v. London & South Western R. Co.*, (1867) L. R. 2 Q. B. 534.

R. 47, C. A.

(d) *Gwilliam v. Twist*, (1895) 1 Q. B.

(c) *Coppen v. Moore*, (1898) 2 Q. B.

at p. 557. Compare *Beard v. London*

servant has an implied authority from his employer to act in good faith according to the best of his judgment for that employer's interests, subject to this, that in so doing he must violate no express limitation of authority, and must not act in a manner which is plainly unreasonable."

Thus an omnibus conductor or railway guard, whose duty it is to remove from the omnibus or train under his charge any passenger who misconducts himself, has an implied authority to determine in each particular case whether the passenger has misconducted himself (*a*). Where, however, there are upon the spot several servants of different grades, all of them charged with authority to do the act on the occasion arising, it is not necessarily all of such servants who will have the authority to determine whether the occasion for action has arisen; it is in such case a question for the jury whether the particular servant who exercises the determination had authority so to determine (*b*).

Nor is it sufficient for the jury to find that the servant had in fact, under certain circumstances, a sufficient authority delegated to him to cover the tortious act committed; it being also necessary, in order to render the master liable, for the plaintiff to show, and for the jury to find, that the necessities of the particular case actually raised, by implication, an authority for the servant to perform the act complained of (*c*). In *Hawtayne v. Bourne* (*d*) it was held that a servant cannot be treated as having any implied authority to pledge his master's credit in cases of necessity, however pressing; and, if so, he can have no implied authority to employ a servant for reward, a limitation which practically covers the whole field of employment.

All servants of railway companies may, by virtue of the provisions of the Regulation of Railways Act, 1889 (*e*), lawfully arrest a passenger who "having failed either to produce, or, if

General Omnibus Co., (1900) 2 Q. B. 530.

(*a*) *Seymour v. Greenwood*, (1861) 7 H. & N. p. 358; *Bayley v. Manchester, Sheffield, &c., R. Co.*, (1873) L. R. 8 C. P. 148.

(*b*) *Per Jervis, C.J., Giles v. Taff Vale R. Co.*, 2 E. & B. p. 830. And see *Owners of Apollo v. Port Talbot Co.*,

(1891) A. C. 499. As to onus of proof of authority, see *Beard v. London General Omnibus Co.*, (1902) 2 Q. B. 530.

(*c*) *Hanson v. Waller*, (1901) 1 Q. B. 390.

(*d*) (1841) 7 M. & W. 595; *Wright v. Glavin*, (1902) 86 L. T. 373, C. A.

(*e*) 52 & 53 Vict. c. 57, s. 5.

requested, to deliver up, a ticket showing that his fare is paid ; or to pay his fare, refuses, on request by such officer or servant to give his name and address." But a passenger giving his correct name and address may not be detained pending enquiries as to the accuracy of the information (a).

And the fact that a particular servant takes upon himself to arrest a passenger under the above circumstances, is *primâ facie* evidence that he is invested by the company with authority so to do, even though there are servants of higher grades upon the spot, to whom he might have referred the matter (b).

All servants have *primâ facie* an implied authority to do all those things that are necessary for the protection of the property entrusted to their charge (c) ; and this seems to include an authority to arrest and search a person whom the servant reasonably believes to have stolen such property, if he could not recover it without taking the supposed thief into custody. Therefore, where a ticket-clerk in the employment of a railway company, being entrusted with the custody of the tickets, suspected a passenger of having feloniously abstracted a ticket from the counter, and with the object of recovering possession of the ticket, detained the passenger on a charge of stealing it, and searched him, it was held that he had implied authority to do so, and that the company were liable for his act (d). This authority to arrest persons suspected of stealing their master's property is, however, probably confined to the case of property entrusted to the custody of the servant causing the arrest, and does not extend to the case of property entrusted to the custody of a fellow servant. But no servant has any implied authority to arrest a person suspected of an attempt to steal his master's property after the attempt has ceased ; for the arrest of the supposed offender is in such case material only to the vindication of justice, and not to the protection of the master's interests (e) ; and this rule

Implied authority of servants to do what is necessary to protect property entrusted to their charge.

(a) *Knights v. London, Chatham & Dover R. Co.*, (1893) 62 L. J. Q. B. 378.

(b) *Goff v. Great Northern R. Co.*, (1861) 3 E. & E. 672 ; *Moore v. Metropolitan R. Co.*, (1872) L. R. 8 Q. B. 36.

(c) *Per Blackburn, J., Allen v. London & South Western R. Co.*, (1870)

L. R. 6 Q. B. p. 69.

(d) *Van Den Eynde v. Ulster R. Co.*, (1871) 5 Ir. Rep. C. L. 328.

(e) *Allen v. London & South Western R. Co.*, (1870) L. R. 6 Q. B. 65 ; *Abrahams v. Deakin*, (1891) 1 Q. B. 516.

equally applies where the supposed attempt to steal is still continuing, if the arrest is unnecessary to the recovery of the property (*a*). Whether, indeed, in any case a servant can have implied authority to institute a prosecution for a supposed larceny of or injury to the master's property is very doubtful; probably he cannot, for the master cannot be inferred to authorise the doing of acts which cannot be for his benefit (*b*).

Implied authority of solicitor of party issuing *fi. fa.* to direct sheriff what goods to seize.

It has been held that the solicitor of a judgment creditor issuing a *fi. fa.* has no implied authority from his client to give verbal directions to the sheriff where or what goods to seize (*c*); but that, on the other hand, it is within the scope of his implied authority to indorse such direction in writing on the writ (*d*). The explanation of this distinction is that the Court of Appeal which decided the former case, though disapproving the decision in the latter, regarded it as too long established to justify them in overruling it.

The servant at the time of committing the tort must be engaged on his master's business.

To render the master liable, however, for the servant's misconduct, it is not enough that the misconduct should have occurred in the course of doing an act of a kind which the servant was usually authorised to do, unless at the time the servant was doing it on the master's behalf. Thus it is the ordinary duty of a carman to drive his master's horse and cart; but where a carman after having finished his day's work, and before shutting up his master's horse and cart for the night started off with it without the master's knowledge on business of his own, and in the course of his journey negligently drove over the plaintiff, the master was held not liable (*e*). But if the carman while engaged on his master's business improperly and for his own purposes made a slight detour the master might be liable; in such case "it is a question of degree as to how far the deviation could be considered a separate journey" (*f*).

(*a*) *Edwards v. London & North Western R. Co.*, (1870) L. R. 5 C. P. 445; *Hanson v. Waller*, (1901) 1 Q. B. 390; *Stevens v. Hinshelwood*, (1891) 55 J. P. 341, C. A.

(*b*) But see *Bank of New South Wales v. Owston*, (1879) 4 App. Cas. 270.

(*c*) *Smith v. Keal*, (1882) 9 Q. B. D. 340, and see *Powder v. Fleming*, (1870)

Ir. R. 4 C. L. 404.

(*d*) *Jarmain v. Hooper*, (1843) 6 M. & G. 827. See above, p. 69, note (*b*).

(*e*) *Mitchell v. Cranweller*, (1853) 13 C. B. 237; and see *Sanderson v. Collins*, (1904) 1 K. B. 628, C. A.

(*f*) *Per Cockburn, C.J., Storey v. Ashton*, (1869) L. R. 4 Q. B. p. 480.

Whether a master is to be held responsible for the negligence of the servant in the course of doing something which the servant is not employed to do, but is merely permitted to do, for his own pleasure or convenience, has never been much considered ; but it is apprehended that the act to which the negligence is directly incidental must, on the principle of the above cases, and by analogy to the rule as to wilful torts (a), be done on behalf of the master, and that it is not enough that it should have been merely permitted. If a servant does an act for his own pleasure, *quoad* that act he is a stranger to his master, although he may be in other respects engaged at the time upon the master's business, and the mere fact that the master does not prohibit the doing of the act ought not to render him liable. But where the first and main object of the action in which the servant was engaged, at the time of committing the tort, was his master's advantage, the wrong-doing of the tort-feasor relates back to his employer, who consequently becomes liable for the acts of his servant (b). In *William v. Jones* (c), where the plaintiff lent a shed to the defendant to make a signboard in, and a carpenter employed by the defendant whilst at work in the shed making the signboard lit his pipe with a shaving and dropped the lighted shaving on to the ground whereby he set fire to the shed, the majority of the Court indeed suggested that if the defendant had known that the carpenter was in the habit of smoking, and had taken no steps to prevent his doing so in the plaintiff's shed, he might have been liable ; but it is inferred that the liability there suggested was a liability on the contract of loan, not a liability in tort. However, in *Ruddiman v. Smith* (d), where the defendants had in their office a lavatory for the use of their clerks, and one of the clerks, after office hours, and preparatory to leaving the office for the night, went to the lavatory for the purpose of washing his hands and left the tap turned on, whereby damage happened to the plaintiffs who occupied the floor below, a Divisional Court held that the defendants were responsible, notwithstanding that the use of the lavatory by the clerk being after office hours, was for his own

Negligence of servant in course of doing something which he is permitted to do for his own convenience.

(a) As to which see below, p. 84.

(c) (1864-5) 3 H. & C. 602.

(b) *Gracey v. Belfast Tramway Co.*,

(d) (1889) 5 Times L. R. 417.

(1901) 2 Ir. Repts. 322.

private purposes and not for the purpose of fitting him to discharge his duty to his employers. But the actual decision in this case may perhaps be supported on grounds unconnected with the law of agency; the case may possibly come within the principle that a person who permits another to commit a nuisance on his premises is responsible for it, although the parties may not stand in the relation of principal and agent. Where, however, the employee is a trespasser, no responsibility attaches to his master. Thus when under similar circumstances to the above, a clerk, in spite of the express prohibition of his employer, entered his room in his absence, and after washing his hands in the lavatory left the tap running, it was held that the master was not liable for the damage caused thereby (a).

Tort where wilful must be intended for master's benefit.

As a rule, in order to render a master liable for his servants' torts the actual misconduct itself must, if intentional, have been done on the master's behalf (b). If, though in other respects within the scope of the employment, it be done from any other motive than that of benefiting the master, the master cannot be held responsible. "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master will not be liable" (c); but if he do precisely the same act with object of extricating his master's carriage from a difficulty his master will be liable (d). So where a bank manager made a false representation as to the pecuniary position of a customer of the bank, with the view of inducing the plaintiff to supply goods to the customer upon credit to enable him to carry out a government contract, and did so with the object of enabling the customer, on receipt of the government contract money, to reduce the amount of his indebtedness to the bank, the bank was held responsible for the fraud of the manager (e). But where, on the other hand, a secretary of a company, in answers to questions put to him as to the validity of certain debenture stock of the

(a) *Sterens v. Woodward*, (1881) 6 Q. B. D. 320.

(b) *Armitage v. Lancashire & Yorkshire R. Co.*, (1902) 2 K. B. 178, C. A.

(c) *Croft v. Alison*, (1821) 4 B. & Ald. p. 592.

(d) *Ibid.* And cp. *Dyer v. Munday*, (1895) 1 Q. B. 742, with *Richards v. West Middlesex Waterworks Co.*, (1885) 15 Q. B. D. 660.

(e) *Barwick v. English Joint Stock Bank*, (1867) L. R. 2 Ex. 259.

company, made fraudulent statements for his own private ends and not for the benefit of the company, it was held that the company were not liable, although the answering of such questions was within the scope of his employment (a).

Provided the tortious act is within the scope of the servant's employment and is committed with the object of benefiting the master, the measure of the master's liability will be precisely the same as if the act had been committed by himself, that is to say, it will not be confined to the amount of the benefit he has actually received, but will extend to the whole amount of the loss suffered by the plaintiff; and this will apply as well to frauds as to trespasses. A master is liable for the fraud of his servant beyond the extent to which he has profited by such fraud (b); though, in order to charge any person with a fraud which has not been personally committed by him, the agent who actually committed the fraud must have done so while acting within the scope of his authority (c). But as regards his liability for his servant's torts, "no sensible distinction can be drawn between the case of fraud and the case of any other wrong" (d). In none of the cases, indeed (with apparently one exception), in which a master has been held liable in tort for his servant's fraud, did this question arise, the amounts of the benefit and loss respectively having been in all such cases co-extensive; but in *Swift v. Winterbotham* (e), where a bank manager, within the scope of whose employment it was to answer enquiries as to the credit of customers of the bank, in reply to such an enquiry made a fraudulent statement as to a particular customer's credit, whereby the person on whose behalf the enquiry was made sold goods to the customer on credit and lost their price in consequence of his insolvency, the bank were held liable to the extent of the value of the goods, although they

Measure of
master's
liability for
fraud of
servant.

(a) *British Mutual Banking Co. v. Charnwood Forest R. Co.*, (1887) 18 Q. B. D. 714; *Thorne v. Heard*, (1894) 1 Ch. 599; and (1895) A. C. 495; and see *Ruben v. Great Fingall Consolidated and Others*, (1904) 2 K. B. 712, C. A. The case of *Shaw v. Port Philip Gold Mining Co.*, (1884) 13 Q. B. D. 103, must be treated as overruled.

(b) *Semble per Lord Selborne, Houldsworth v. City of Glasgow Bank*, (1880) 5 App. Cas. p. 329.

(c) *Thorne v. Heard*, (1895) A. C. 495.

(d) *Per Cur.*, *Barwick v. English Joint Stock Bank*, (1867) L. R. 2 Ex. p. 265.

(e) (1873) L. R. 8 Q. B. 244.

in fact derived no benefit whatever from the false statement. This case was decided on the authority of *Barwick v. English Joint Stock Bank*, and therefore it must be assumed that the manager in making the false statement intended to act in the interest of the bank, his object being probably to do a service to the customer and thereby retain his custom. This decision, indeed, was reversed in the Exchequer Chamber on a different point; but notwithstanding such reversal, it must, as an authority on the point now under discussion, be treated as standing good. In the *British Mutual Banking Co. v. Charnwood Forest Railway Co.* (a), Bowen, L.J., doubted whether statutory corporations can be made liable beyond the actual benefit received, on the ground, apparently, that their powers being limited, they cannot bind themselves to answer for the consequences of the representation made. But this doctrine apparently applies only when the statutes by which the corporation is created or regulated are either expressly or by implication violated; or, in other words, where the tortious act was originally *ultra vires* (b).

For injury caused by servant to fellow-servant in common employment master not liable at common law.

To the rule that a master is liable for injuries caused by the negligence of his servant in the course of his employment, an exception exists where the party injured is not a stranger but a fellow-servant of the party causing the injury and engaged in a common employment with him. Towards such servant the master is at common law not liable (c); unless, indeed, the injury, though actually committed by the hand of the fellow-servant, was either mediately or immediately occasioned by some cause of which the employer was, and the workman was not, aware (d). But to exempt the master from liability in such case all the above conditions must be satisfied. *First*, the servants must be fellow-servants; *second*, they must be in the service of a common employer; and *third*, as before stated, the cause of the accident must not be one that was apparent to the master and concealed from the servant. Therefore where one of a joint staff

(a) *British Mutual Banking Co. v. Charnwood Forest R. Co.*, (1887) 18 Q. B. D. p. 719.

(b) *Preston v. Liverpool, Manchester & Newcastle Ry.*, (1856) 5 H. L. Cas. 605.

(c) *Priestley v. Fowler*, (1837) 3 M. & W. 1.

(d) *Griffiths v. London & St. Katherine's Dock Co.*, (1884) 13 Q. B. D. 259, C. A.; and see *Thomas v. Quartermaine*, (1887) 18 Q. B. D. 685, C. A.

of servants at a railway station used by two companies was employed by and dismissible by one of the companies only, his employers were held responsible for injuries caused by his negligence to another member of the staff employed by the other company. It is not enough that the work should be common, but both parties must be servants of the same master (a), but when an accident is caused "to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the employment of the master," according to Lord Cairns, the master "is not liable, although the two workmen cannot technically be described as fellow-workmen" (b). For the same reason, one who engages an independent contractor to do certain work as part of a job upon which his own servants are employed, is liable for injuries caused by the negligence of the latter to the servants of the contractor (c). Provided, however, that the two parties are both servants of the same master, in considering whether they are fellow-servants it is immaterial that they are not of the same grade. "Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority" (d), although the doctrine of "common employment" does not cover the case of an employer *personally* injuring an employee (e). Thus the captain and crew employed in the navigation of a ship by the owner are fellow-servants within the meaning of the rule (f).

Secondly, they must be engaged on a common employment, that is to say, the work must be common, but it need not be identical. "It is not necessary for this purpose that the workman causing and the workman sustaining the injury should both be engaged in performing the same or similar acts. The driver and the guard of a stage-coach, the steersman and the rowers of a boat, the workman who draws the red-hot iron from the forge and

(a) *Swainson v. North Eastern R. Co.*, (1878) 3 Ex. D. 341.

(b) *Wilson v. Merry*, (1868) L. R. 1 Sco. App. at p. 332.

(c) *Johnson v. Lindsay*, (1891) A. C. 371; *Cameron v. Nystrom*, (1893) A. C. 300; and see *Claridge v. Union Steamship Co.*, (1894) A. C. 185; *Waldock v. Winfield*, (1901) 2 K. B. 596.

(d) *Per* Lord Cranworth, *Wilson v. Merry*, (1868) L. R. 1 H. L. Sc. App. p. 334.

(e) *Warren v. Wilder*, (1872) 41 L. J. C. P. 104 n.

(f) *Hedley v. Pinkney & Sons Steamship Co.*, (1892) 1 Q. B. 58; H. L., (1894) A. C. 222.

those who hammer it into shape, the engineman who conducts a train and the man who regulates the switches or the signals, are all engaged in common work" (a), and in one instance the rule was applied in the case of persons whose duties were so diverse as the general traffic manager of a railway company and a milesman (b). "Where the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one, in what he is doing as part of the work which he is bound to do, may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other" (c). Whether the work is common is in each case a question of degree, "but in general, by keeping in view what the servant must have known, or expected to be involved in the service which he undertakes, a satisfactory conclusion may be arrived at" (d). In addition to which, it is necessary that the employment must be common, in the sense that the safety of the one servant must, in the ordinary and natural course of things, depend on the care and skill of the others (e).

Principle on which doctrine of common employment rests.

The principle upon which the master's exemption from liability in such cases rests is this, that "a servant who engages for the performance of services for compensation does as an implied part of the contract take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services; the presumption of law being that the compensation was adjusted accordingly, or in other words, that these risks are considered in his wages" (f).

Doubtful whether master liable for injuries caused to guests.

It has indeed been suggested that this exception to the general liability of a master for the negligence of his servants is not confined to the case of injuries to fellow-servants, but that "it extends to guests who cannot sue the master of the house for an

(a) *Per* Lord Cranworth, *Bartons-hill Coal Co. v. Reid*, (1858) 3 Macq. p. 295.

(b) *Conway v. Belfast, &c., R. Co.*, (1877) 11 Ir. R. C. L. p. 345.

(c) *Per* Brett, L.J., *Charles v. Taylor*, (1878) 3 C. P. D. p. 496.

(d) *Per* Lord Chelmsford, *Bartons-*

hill Coal Co. v. McGuire, (1858) 3 Macq. p. 308.

(e) *Morgan v. Vale of Neath R. Co.*, (1864) 5 B. & S. at p. 580.

(f) *Per* Blackburn, J., *Morgan v. Vale of Neath R. Co.*, (1864) 5 B. & S. p. 578.

injury done by his servants" (a). It has been said that "if a lady who is invited to dinner, goes in an expensive dress, and a servant spills something over her dress, which spoils it, the master of the house would not be liable. Where a person enters a house by invitation, the same rule prevails as in the case of a servant" (b). This notion, however, seems to be opposed to principle. A guest cannot be presumed to take upon himself the risk of the negligence of his host's servants, for the guest receives no wages in which such risks can be considered. The relationship of host and guest can, in point of law, be regarded as neither more nor less than that of a licensor and licensee (c): and a licensor is as towards a bare licensee liable for acts of negligence committed by his servants after the licensee has entered upon the premises, as, for instance, where the servants of the owner of a private way passing by his warehouse, by negligently lowering goods from the warehouse, injure a person using the way by the owner's permission (d). The absence of authority on the point is obviously attributable to the feelings of delicacy which would naturally restrain a guest from suing. Whether a son can sue his father for the negligence of his servants, will depend upon the question whether the son was residing in the house in the character of a servant or in that of a guest.

But though the exception probably does not extend to the case of guests, it does extend to that of third persons who take upon themselves, without the defendant's consent, to assist the defendant's servants in doing their work. "One who volunteers to associate himself with the defendant's servant in the performance of his work, and that without the consent or even knowledge of his master, cannot stand in a better position than those with whom he associates himself in respect of their master's liability" (e).

(a) *Per* Bramwell, L.J., *Swainson v. North Eastern R. Co.*, (1878) 3 Ex. D. 343.

(b) *Per* Pollock, C.B., *Southcote v. Bailey*, (1856) 1 H. & N. p. 249. The actual decision in that case may well be interpreted on the ground that the plaintiff was a bare licensee, and that the existence of the source of danger was unknown to the defendant.

(c) If there is any such distinction, at what point does a person cease to be a mere licensee and become a guest? Is the supply of gratuitous refreshment necessary?

(d) *Gallagher v. Humphrey*, (1862) 6 L. T. N. S. 684; *Scott v. London Dock Co.*, (1865) 3 H. & C. 596.

(e) *Per* Erle, C.J., *Potter v. Faulkner*, (1861) 1 B. & S. p. 806.

Whether, however, the master will be liable for the negligence of his servants to a volunteer who gratuitously assists the servants in their work with the full knowledge and assent of their master is doubtful. On the one hand, such person in doing the work with the master's assent, and for the master's benefit, would, in respect of such work, become the servant of the master so as to render the master liable for any negligence on his part towards a stranger. But, on the other hand, as he would receive no wages in which the risk of the fellow-servant's negligence could be considered, there would be no consideration for any implied contract to take such risk upon himself. Where, indeed, a person, who gratuitously assists another's servants in their work with their master's assent, is something more than a volunteer, and renders the assistance less for the benefit of the master than for his own, it may be that the master will be liable to him for any negligence on the part of his servants. Thus, where the plaintiff caused a heifer to be sent to him by the defendants' railway to a particular station, and on arrival of the animal at the station he, with the assent of the station-master, assisted the defendants' servants in shunting the truck in which the heifer was, with the view of expediting its delivery to himself, and whilst so engaged, was injured by the negligence of the defendants' servants, it was held that the defendants were liable (a). But with regard to that case it is to be observed that the plaintiff, not having rendered the assistance for the benefit of the master, did not place himself in the position of a servant at all.

Master liable
to servant
for his own
negligence.

But although at common law a servant when entering into the service impliedly takes upon himself the risk of the negligence of his fellow-servants, he does not take on himself the risk of his master's negligence. For his own acts of negligence the master is liable to his servant; and as it would be an act of negligence on the part of the master when engaging servants not to take precautions to ascertain whether they were persons of competent skill, in the event of his omitting to take such precautions he will be liable for any injury caused by the unskilfulness of such servant

(a) *Wright v. London & North Western R. Co.*, (1876) 1 Q. B. D. 252; (1869) L. R. 4 Ex. 234; L. R. 6 Ex. 123.
and see *Holmes v. North Eastern Ry.*,

to a fellow-servant (a). So it is personal negligence on the part of a master to retain in his employment a servant who, to his knowledge, is habitually negligent, and if by such servant's negligence a fellow-servant be injured, the master will be responsible (b). Again, a master is liable at common law if an accident happens to his servant owing to the premises, plant or machinery being in an unsafe condition unknown to the servant, if the master either knew of the danger or would have discovered it if he had exercised reasonable care. "It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when in fact the master knows, or ought to know, that it is not so" (c). Thus, where a workman was killed in a coal pit by the fall of a stone which overhung an underground way, and there was evidence that the employers' agents below ground knew of the danger, though no evidence that the employers themselves knew of it, the House of Lords held that there was evidence for the jury that the employers had failed in their duty (d). The liability of the employers in that case would seem to arise, not from the knowledge of the agents, for they were fellow-servants with the deceased workman, and negligence on their part could create no liability in their employers, but from the failure of the employers themselves to personally inspect the dangerous way. In *Smith v. Baker* (e), where a workman was injured by a defect in the master's works, Lord Watson said: "At common law, his (the master's) ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect." And this duty of the master to take reasonable precautions for his servant's safety must extend to the condition of the premises just as much as to that of the plant. The servant seems even at common law, so far as his master's personal duty was concerned, to have been in the same

(a) *Hutchinson v. York & Newcastle R. Co.*, (1850) 5 Exch. 343; *Tarrant v. Webb*, (1856) 18 C. B. 797; *Smith v. Howard*, (1870) 22 L. T. N. S. 130.

(b) *Senior v. Ward*, (1859) 28 L. J. Q. B. 139. A single instance of forgetfulness may be proof of incompetence (*Barter v. L. & C. Printing Works*, (1899) 1 Q. B. 901).

(c) *Per* Lord Cranworth, (1854) 1 Macq., p. 751.

(d) *Paterson v. Wallace*, (1854) 1 Macq. 748; *Groves v. Lord Wimborne*, (1898) 2 Q. B. 402; *Williams v. Birmingham Battery & Metal Co.*, (1899) 2 Q. B. 338, C. A.

(e) (1891) A. C. p. 356.

position as a licensee coming on business. In one case indeed (a), it was said to be essential to aver in the statement of claim that the danger which caused the accident to the servant was known to the master. But the rule seems to have been stated there too narrowly. What the Court were there directly concerned with was the necessity, not of the knowledge of the master, but of the ignorance of the servant (b).

But although it is usually essential to the servant's right of action, in such cases, that the danger should have been unknown to the servant, mere general knowledge by him that there is a danger of some degree will apparently not suffice to discharge the master; there must be such knowledge as involves a full comprehension of the risk (c), coupled, apparently, with an agreement on the part of the workman to undertake the danger occasioned by the absence of proper and fit appliances (c).

Where the servant is employed by a partnership, each member of the firm will be liable to the servant for injuries arising from the negligence of the co-partners (d).

Employers'
Liability Act.

The above Common Law rule that a master is not responsible to his servant for the negligence of a fellow-servant, has, however, been considerably modified by the Employers' Liability Act, 1880 (e), by s. 1 of which it is enacted that "where personal injury is caused to a workman (1) by reason of any defect in the condition of the ways (f),

(a) *Griffiths v. London & St. Katherine Docks Co.*, (1884) 13 Q. B. D. 259.

(b) The case of *Seymour v. Maddox*, (1851) 16 Q. B. 326, where a declaration which alleged that the plaintiff was employed as a chorus-singer at the defendant's theatre, and that, owing to the defendant's neglect to light and fence a certain hole in the floor of the theatre, the plaintiff fell down the hole and was injured, was held bad, turned purely on a question of pleading. The declaration did not sufficiently aver the facts from which the duty alleged arose. Amongst other things it did not negative the plaintiff's knowledge of the danger.

(c) *Williams v. Birmingham Battery & Metal Co.*, (1899) 2 Q. B. 338, C. A.; and see the discussion on the subject of

"*Volenti non fit injuria*" below, at the end of Ch. XV.

(d) *Ashworth v. Stanwix*, (1861) 3 E. & E. 701; *Mellors v. Shaw*, (1861) 1 B. & S. 437.

(e) 43 & 44 Vict. c. 42.

(f) The defect in the ways, by which is meant "a lack or absence of something essential to completeness" (*Tate v. Latham & Sons*, (1897) 1 Q. B. 502 at p. 506), in some material thing "which may be used within, or used in connection with, the business of the employer" (*McGiffin v. Palmer*, (1882) 10 Q. B. D. 5, p. 8), must be a "somewhat chronic" defect, not the result of a mere negligent user (*Willett v. Wat & Co.*, (1892) 61 L. J. Q. B. 540, at p. 545; (1892) 2 Q. B. 92).

works (a), machinery, or plant (b), connected with or used in the business of the employer (c); or (2), by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him (d) whilst in the exercise of such superintendence; or (3), by reason of the negligence (e) of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform (f), and did conform, where such injury resulted from his having so conformed; or (4), by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or (5), by reason of the negligence of any person in the service of the employer who has the charge or control (g) of any signal, points, locomotive engine, or train upon a railway (h), the workman, or in case the injury results in death, the legal personal representatives of the workman and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

Provided that a workman is not to be entitled under the Act to

(a) *Smith v. Baker*, (1891) A. C. 325; *Brannigan v. Robinson*, (1892) 1 Q. B. 344.

(b) *Heske v. Samuelson*, (1883) 12 Q. B. D. 30; *Cripps v. Judge*, (1884) 13 Q. B. D. 583. But an employer is not bound to keep pace with the latest inventions in machinery or appliances (*Butler v. Bernbaum*, (1891) 7 T. L. R. 287). For definition of "plant," see *Yarmouth v. France*, (1887) 19 Q. B. D. 647. at p. 658.

(c) Machinery merely because it is being removed in a broken-down condition does not thereby cease to be "machinery" within the meaning of s. 1, subs. 1 of the Employers' Liability Act, 1880 (*Thompson v. City Glass Bottle Co.*, (1902) 1 K. B. 233).

(d) *Shaffers v. General Steam Navigation Co.*, (1883) 10 Q. B. D. 356; and see *Macdonald v. Wyllie*, (1898) 1 F.

Ct. of Sess. 339. As to what constitutes a person having superintendence entrusted to him, see *Hall v. North Eastern R. Co.*, (1885) 1 T. L. R. 359; *Kellard v. Rooke*, (1888) 21 Q. B. D. 367.

(e) *Wild v. Waygood*, (1892) 1 Q. B. 783. The negligence need not be in the order itself; it may be subsequent to the order, provided the accident result from such negligence, coupled with the act of the workman in conforming to the order.

(f) *Snowden v. Baynes*, (1890) 23 Q. B. D. 193; *Dolan v. Anderson*, (1885) 12 Rettie, Ct. of Sess. 804; *Marley v. Osborne*, (1894) 10 T. L. R. 388.

(g) *Gibbs v. Great Western R. Co.*, (1879) 12 Q. B. D. 208.

(h) *McCord v. Cammell & Co.*, (1896) A. C. 57; *Cox v. Great Western Ry.*, (1882) 9 Q. B. D. 106.

any remedy against his employer "under sub-section 1 of section 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer (a); or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition;" or, "under sub-section 4 of section 1, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of his Majesty's principal Secretaries of State, or by the Board of Trade, or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or by-law;" or "in any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence" (b). It is not to be inferred from this last clause that the mere giving of notice to the superior will entitle the servant to sue in a case in which with knowledge of the danger he voluntarily courts the risk; the object of the statute was to place the servant in respect of the negligence of his fellow-servant in the same position as a stranger coming on business (c). In construing the term "workman," for the purposes of the Employers' Liability Act of 1880, it has been held, that an independent contractor who works with his men "is not a fellow-workman" with them. Consequently (there being no privity or relationship of master and servant between the employer of the independent contractor and the workmen engaged by the contractor) the person by whom the independent contractor is employed is under no responsibility to a workman, engaged by the latter, who may be injured by the negligence of the

(a) On this point the Act seems to give no new remedy, but to be merely declaratory of the Common Law.

(b) s. 2.

(c) See *per* Bowen and Fry, L.JJ., *Thomas v. Quartermaine*, (1887) 13 Q. B. D. 685; and see below, discussion at end of Ch. XV.

independent contractor or his workmen during the course of the employment (a).

A person is not, however, entitled to sue under the Act unless he gives notice of the injury he has sustained within six weeks, and the action is commenced within six months from the occurrence of the accident, or in case of death within twelve months from the time of death (b). The compensation recoverable under the Act is limited to the amount of three years' earnings (c). The action can only be brought in a County Court (d).

The above Act does not apply to servants of all kinds but only to workmen, which expression is defined (e) to mean railway servants whether engaged in manual labour or not, and persons to whom the Employers and Workmen Act, 1875, applies, in which Act "the expression workman does not include a domestic or menial servant, but save as aforesaid means any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, has entered into or works under a contract with an employer" (f).

Class of
servants to
which the
statute
applies.

It has been held that an omnibus conductor (g), a railway guard (h), a grocer's assistant (i), and a tram-car driver (k), are not persons engaged in manual labour, and are consequently not within the definition of "workmen" as used in the Employers and Workmen Act, 1875.

Many of the anomalies of the Employers' Liability Act, 1880, however, have been removed (especially in the case of dangerous employments) by subsequent legislation; the effect of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), as amplified by the later Act of 1900 (63 & 64 Vict. c. 22), being to include within the generic term "workman" (l), every

(a) *Marrow v. Flimby & Broughton*
Mar Coal Co., (1898) 2 Q. B. 588, C. A.

(b) s. 4.

(c) s. 3.

(d) s. 6.

(e) s. 8.

(f) 38 & 39 Vict. c. 90, s. 10.

(g) *Morgan v. London General Omni-*

bus Co., (1884) 13 Q. B. D. 832.

(h) *Hunt v. Great Northern R. Co.*
(1891) 1 Q. B. 601.

(i) *Bound v. Lawrence*, (1892) 1
Q. B. 226.

(k) *Cook v. North Metropolitan Tram-*
ways Co., (1887) 18 Q. B. D. 683.

(l) Seamen engaged in their ordinary

person who is engaged on, or in, or about (a) an employment to which "these Acts apply" (b), whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing.

The scope of the employments comprised within the purview of these Acts includes "any person (male or female (c)) employed on or in or about a railway (d), factory (e), mine (f),

duties on board a vessel in dock are not "workmen" for the purposes of the Act: *Griffin v. Houlder Line, Ltd.*, (1905) A. C. 220; *Owens v. Campbell*, (1904) 2 K. B. 60, C. A.; *Corbett v. Pearce*, (1904) 2 K. B. 422. Neither is the certificated manager of a coal mine, receiving a yearly salary (*Simpson v. Ebbw Vale Steel, Iron & Coal Co.*, (1905) 1 K. B. 453), nor one of the partners in a mining firm who, by arrangement with his co-partners, acted as working foreman of the mine (*Ellis v. Joseph Ellis & Co.*, (1905) 1 K. B. 324, C. A.).

(a) For definitions of engagement "on, or in, or about," see *Owens v. Campbell*, (1904) 2 K. B. 60, C. A.; *Andrews v. Failsworth Industrial Society, Ltd. (Injury by Lightning)*, (1904) 2 K. B. 32, C. A.; *Blorett v. Sawyer (Injury during Dinner-hour)*, (1904) 1 K. B. 271, C. A.; *Brinton's, Ltd. v. Turrey (Death from Anthrax)*, (1905) A. C. 230; *Mackenzie v. Coltness Iron Co., Ltd. (Miner going to Work)*, (1903) 6 F. 8, Ct. of Sess.; *McIntyre v. Bodger (Struggle between Workmen for Possession of Tool)*, (1903) 6 F. 176, Ct. of Sess.; *Rogers v. Mayor, &c., of Cardiff (Accident while proceeding from one place of repair (electric wire) to another)*, (1905) 22 T. L. R. 22; see also *Fenn v. Miller*, (1900) 1 Q. B. 788; *Woodham v. Atlantic Transport Co.*, (1899) 2 Q. B. 15; *Cosgrave v. Anglo-American Oil Co.*, (1900) 34 Ir. L. T. R. 56, C. A. Engagement not "on, or in, or about": *Benson v. Lancashire & Yorkshire R. Co.*, (1904) 1 K. B. 242, C. A.; *Back v. Dick, Kerr & Co.*, (1905) 2 K. B. 148, C. A.; *Spacey v. Dowlais Gas & Coke Co., Ltd.*, (1905) 22 T. L. R.

29.

(b) And see "Chitty on Contracts," 14th ed.

(c) Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 1, subs. 1).

(d) The term "railway," by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48, s. 3), applies only to a railway constructed or carried on under the powers of an Act of Parliament. A tramway, laid along a public road, and similarly authorised, is also included (*Fletcher v. London United Tramways Co., Ltd.*, (1902) 2 K. B. 269, C. A.).

(e) For definitions of "factory" and "workshop," see 1 Edw. VII. c. 22, s. 149, and schedule 6. The term "factory" also includes every laundry worked by steam, water, or other mechanical power, and any dock, wharf, quay, warehouse, machinery or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. This Act is now repealed, with the exceptions of s. 12, subs. 3 of s. 24, and s. 28, and replaced by the Factory and Workshop Act, 1901. For judicial decisions as to what is a "factory" for the purposes of this Act, see *Barrett v. Kemp Bros.*, (1904) 1 K. B. 517; *Kavanagh v. Caledonian R. Co.*, (1903) 5 F. 1128, Ct. of Sess.; *Green v. Britten and Gilson*, (1904) 1 K. B. 350; *Dye v. Swift Cycle Co.*, (1904) 2 K. B. 36; *Brass v. London County Council*, (1904) 2 K. B. 336; *Houlder Line v. Griffin*, (1905) A. C. 220.

(f) For statutory meaning of "mine," see 35 & 36 Vict. c. 77, s. 41, and 50 & 51 Vict. c. 58, s. 75. "Pit banks" are factories within 1 Edw. VII. c. 22, sched. 6, clause 27; and see *Anderson*

quarry (a), or engineering work (b), and to employment by the undertakers (c), on or in or about any building which exceeds thirty feet in height (d), and is either being constructed or repaired by means of a scaffolding (e), or being demolished, or on which machinery driven by steam, water, or other mechanical power (f) is being used for the purpose of the construction, repair, or demolition thereof." It also applies "to the employment of workmen in agriculture (g), by any employer (h), who habitually

v. Lockgelly Iron and Coal Co., Ltd., (1904) 7 F. 187, Ct. of Sess.

(a) For definition of "quarry," see 57 & 58 Vict. c. 42, s. 1, and *Scott v. Midland Ry.*, (1901) 1 Q. B. 317.

(b) "Engineering work" means any work of construction, or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or mechanical power is used; and see *Coles v. Anderson*, (1905) 69 J. P. 201; *Adams v. Shaddock*, (1905) 22 T. L. R. 15, C. A. For rule as to area of work, see *Atkinson v. Lamb*, (1903) 1 K. B. 861, C. A. The term, however, does not apply to work done at a distance, ancillary to the principal object of the undertaking (*Chambers v. Whitehaven Harbour Commissioners*, (1899) 2 Q. B. 132, C. A.).

(c) In the case of "engineering work," the "undertaker" is the person (including any body of persons corporate or unincorporate, 52 & 53 Vict. c. 63, s. 19) undertaking the construction, alteration, or repair, and in the case of a building, the person undertaking the construction, repair or demolition. In the case of a railway, the phrase implies the railway company; when applied to a factory, quarry, or laundry the occupier thereof, within the meaning of the Factory and Workshops Acts, 1878—1895; and in the case of a mine, the owner thereof within the meaning of 35 & 36 Vict. c. 77, s. 41, and 50 & 51 Vict. c. 58, s. 75. The Act 60 & 61 Vict. c. 37, s. 8, includes the

Crown in the term "undertaker" in any employment other than the naval and military services. For other definitions of "undertakers," see *McCabe v. Jopling*, (1904) 1 K. B. 222; *Wearings v. Kirk and Randall*, (1904) 1 K. B. 213; *Houlder Line v. Griffin*, (1905) A. C. 220; *Ramsay v. Mackie*, (1904) 7 F. 106, Ct. of Sess.

(d) For definitions of "building" for the purposes of the Act, see *Aylward v. Matthews*, (1905) 1 K. B. 343, C. A.; *Plant v. Wright*, (1905) 1 K. B. 353, C. A.; *Hartley v. Quick*, (1905) 1 K. B. 359.

(e) For definition of "scaffolding" see *Hoddinott v. Newton, Chambers & Co.*, (1901) A. C. 49; *Crowther v. West Riding Window Cleaning Co.*, (1904) 1 K. B. 232; *Campbell v. Sellars*, (1903) 5 F. 900, Ct. of Sess.; *O'Brien v. Dobbie*, (1905) 1 K. B. 346.

(f) "Other mechanical power" must be construed *ejusdem generis* with steam, water, electricity, &c. (*Wilmot v. Paton*, (1902) 1 K. B. 237).

(g) The expression "agriculture," for the purposes of the Act, include horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live-stock, poultry or bees, and the growth of fruit and vegetables (63 & 64 Vict. c. 22, s. 1, subs. 3). As to who is a "workman" in agriculture, see *Smith v. Coles*, (1905) 22 T. L. R. 5, C. A.

(h) The term "employer" includes any body of persons corporate or unincorporate, and the legal personal representatives of a deceased employer.

PARTIES.

throughout the Act compensation," but shall be at liberty to deduct from such compensation all sums which, in his judgment, have been caused by the action instead of proceeding under this Act. The Act provides that persons being themselves "undertakers" (that is, persons carrying on a trade or business within the meaning of the Acts) shall, in case of an accident, be liable to the workmen of any sub-contractor who may be employed to carry on any part of their particular business on their behalf (even though such sub-contractor may not himself be an "undertaker" within the meaning of the Act) (a), provided that the work undertaken by the sub-contractor is identical in character with the business which the original undertaker carries on and is not merely ancillary or incidental thereto (b). There is no injury in respect of which compensation is recoverable was caused under circumstances creating a legal liability to a third party, the workman may, at his option, proceed alternatively, either at law against such third party to recover damages or against his employer under the Act, but not both. It has, moreover, been held that the word "undertaker" and the word "undertaker" are for the purposes of the Act interchangeable. Consequently a sum received by way of quittance in full, of all claims against one undertaker, though accepted with a specific reservation of all claims against other parties, effectually bars any further action. Should, however, the workman proceed under the Act and recover compensation, the employer is entitled to be indemnified by the actual committer of the wrongful act.

By the Supervisors' Negligence (Remedies) Act, 1905 (c), which amends the remedies of persons injured by the negligence of supervisors, it is provided (s. 1, subs. 4) that, "an

(a) See *Erans v. Cook*, 666, Ct. of Sess.; (1905) 1 K. B. 53, C. A.; see also *Great Northern R. Co. v. Whitehead & Co.*, Times Newspaper, August 9th, 1902.
(c) 5 Edw. VII. c. 100. (This Act comes into force on January 1st, 1906.)

(b) See *Erans v. Cook*, 666, Ct. of Sess.; (1905) 1 K. B. 53, C. A.; see also *Great Northern R. Co. v. Whitehead & Co.*, Times Newspaper, August 9th, 1902.

(c) 5 Edw. VII. c. 100. (This Act comes into force on January 1st, 1906.)

(1904) 6 F.

employer who has paid compensation, or against whom a claim for compensation has been made under the Workmen's Compensation Act, 1897, as amended by any subsequent enactment," shall be entitled to avail himself of any of the provisions of the Act.

In event of an employer's bankruptcy, liability for compensation under the Act is a first charge on such employer's estate, and where the employer has insured against liability, the insurers shall, notwithstanding his bankruptcy, upon the direction of the Judge of the County Court, pay into the Post Office Savings Bank, in the name of the registrar of the Court, any sum that may be allotted to the injured workman as compensation.

A principal who procures work to be done for him by an independent contractor, by an agent that is to say over whom he reserves no power of control, is, in general, and subject to four classes of exceptions to be presently noted, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work. And in this respect the servants of the contractor, whilst acting as such, stand in the same position as their master, so that the employer of the contractor is not liable for the torts committed by the contractor's servants (a), although, as will be subsequently shown, recent judicial decisions have considerably limited the application of this general proposition. Thus one who jobs horses to be driven by the jobmaster's servant is not responsible for the negligence of the driver (b). But in such cases nice questions sometimes arise as to whether the servant was acting as the servant of the contractor or of his employer. Thus in *Jones v. Scullard* (c), where the coachman was paid by the job-master, but the livery and the horse as well as the carriage were provided by the hirer, it was held that the latter and not the job-master was responsible for an accident occasioned by negligent driving. The test in these cases is not which party pays the servant for the work done (d); many

Independent
contractors.

Employer of
contractor
not liable for
torts of
contractor's
servants.

(a) *Milligan v. Wedge*, (1840) 12 A. & E. 737.

(b) *Per Littledale, J., Laughler v. Pointer*, (1826) 5 B. & C. 547; *Quarman v. Burnett*, (1840) 6 M. & W. 499. As to when the master of a tug is to be

treated as the servant of the owner of the vessel towed, see *The Quickstep*, (1890) 15 P. D. 196.

(c) (1898) 2 Q. B. 565, C. A.

(d) *Quarman v. Burnett*, *supra*.

Test whether party committing the tort is the servant of the contractor or his employer.

classes of servants, such, for instance, as waiters and ostlers, as a general rule receive no wages from their masters, and are dependent for their remuneration upon the gratuities they receive from their masters' customers, but that fact does not make them, for the time being, the servants of the customers. Nor is it material that the employer selected the particular servant from amongst the contractor's staff of servants (a). Nor does it affect the question that by the terms of the contract between the employer and the contractor the former should have the power of dismissing the servant for incompetence (b). The true test is whether the employer intended to have a power of controlling the servant supplied by the contractor, and of regulating the manner in which he did his work. Thus, where a local authority contracted with A. to supply a driver and horse to draw their watering cart, and A. selected and paid the driver, and the driver was not under the control or direction of the local authority otherwise than that they directed him what streets to water, they were held not liable for injuries caused by the negligence of the driver whilst engaged in driving their cart (c). So, too, where the owners of a mine employ a contractor to sink a shaft, they providing and placing at the disposal of the contractor the necessary engine with an engineer to work it, and such engineer, who was selected and paid by the owners, was by the terms of the contract, placed entirely under the control of the contractor, the owners were held not liable to a person who was injured by the negligence of the engineer, whilst so acting under the contractor's control, on the ground that he was for the time being the servant of the contractor and not of the owners (d). "Where one person lends his servant to another for a particular employment the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him" (e).

(a) *Quarman v. Burnett*, (1840) 6 M. & W. 499. J. P. 110.

(b) *Reedie v. London & North Western R. Co.*, (1849) 4 Exch. 244. 2 C. P. D. 205.

(c) *Jones v. Corporation of Liverpool*, (1885) 14 Q. B. D. 890; but see *Mileham v. Corporation of Marylebone*, (1903) 67

(d) *Rourke v. White Moss Co.*, (1877)

(e) *Per Cockburn, C.J.*, *ibid.*, p. 209.

And see *Johnson v. Lindsay*, (1891) A. C. 371; *Donoran v. Laing*, (1893) 1 Q. B. 629.

But although where a party, who is not under a statutory obligation to do the work, employs a contractor to do work by himself and his servants, and under the contract it is intended that the employer shall not exercise any control over the servant supplied by the contractor, the employer is not liable for the tortious act of the servant while engaged on the work if he suffer him to do it in his own way, it is otherwise if he interferes with the servant and in fact exercises control over him and directs him to do the work in a particular manner. In such case, if the direction be given, not as mere advice, but as an order, and the servant obey it and injury result therefrom, the employer will be liable (a), and the contractor will not, on the ground that the servant in obeying the direction acted for the moment as the servant of the party giving it and not of his real master. If the employer is liable the contractor is not, and *vice versa*, for a man cannot at one and the same time serve two masters. "He is the servant of one *or* the other, but not the servant of one *and* the other; the law does not recognise a several liability in two principals who are unconnected" (b).

To the general rule that an employer is not liable for the negligence of an independent contractor or his servants there are four exceptions:—

1. Where the act which the contractor is employed to do is one which, if done by the employer, would, though lawful in itself, be done at his peril. 2. Where the contractor is employed to execute certain work which the employer is under positive statutory obligation to execute. 3. Where the work which the contractor is employed to do is, on the face of it, unlawful. 4. Where a person (including a corporation) employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public. In each of these four classes of cases it is obvious that the employer cannot free himself from liability merely by

Exceptions to the general rule that an employer is not liable for the negligence of the contractor or of his servants.

(a) *McLaughlin v. Pryor*, (1842) 4 M. & G. 48. This seems to be the meaning of the decision in this case as interpreted in subsequent cases, though the judgments indeed seem to suggest that where the employer sees the con-

tractor's servant misconducting himself, mere non-protest will render him liable.

(b) *Per Littledale, J., Laughher v. Pointer*, (1826) 5 B. & C. p. 558. And as to right of action, see *Cross v. Matthews*, (1904) 91 L. T. 500.

Rule in
Bower v.
Peate
discussed.

employing a contractor to do the work for him. And it is believed that all the cases in which an employer has been held responsible for the negligence of a contractor may be referred to one or other of those four exceptions. The last of these exceptions is an amplification of the rule laid down in the case of *Bower v. Peate* (a), that "a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else, whether it be the contractor employed to do the work from which the danger arises or some independent person, to do what is necessary to prevent the act he has ordered to be done from becoming wrongful" (b).

Where
work which
contractor is
employed to
do would, if
done by
employer,
be done at
his peril.

1. The actual decision in *Bower v. Peate* was to the effect that where one of two adjoining houses is entitled to support from the other or from the soil underlying it, the owner of the servient tenement, if desirous of rebuilding his house and of excavating the foundations for that purpose, cannot escape responsibility for the consequences of thereby withdrawing the support to which the adjoining house is entitled, by entrusting the task of excavation and rebuilding to an independent contractor. That decision was followed by the House of Lords in *Dalton v. Angus* (c); and the same principle was applied in *Hughes v. Percival* (d), to what also was practically a case of withdrawal of support, namely, a building operation involving interference with a party-wall, whereby the party-wall was weakened and the adjoining house fell. Now it is conceived that the right of support, or rather the right of the dominant owner to have his neighbour refrain from pulling the dominant house down, is an absolute right, and that if the servient owner withdraws the support to which the other is

Withdrawal
of support.

(a) (1876) 1 Q. B. D. 321.

(b) P. 326. See *The Snark*, (1900) P. 105, C. A.; *Penny v. Wimbledon Urban Council*, (1898) 2 Q. B., Bruce, J., at p. 217, affirmed, (1899) 2 Q. B. 72; *Hill v. Tottenham Urban District Council*, (1898) 79 L. T. 495.

(c) (1881) 6 App. Cas. 746.

(d) (1883) 8 App. Cas. 443, overruling *Butler v. Hunter*, (1862) 7 H. & N. 826. The case of removal of support afforded by a party-wall to a modern house seems to stand on the same footing as the removal of support afforded by soil to an ancient one. See *Richards v. Rqse*, (1854) 9 Exch. p. 221.

entitled he does so at his peril (a). In the last-mentioned case Lord Blackburn indeed suggests that the duty cast by law upon the servient owner in such case is not an absolute duty to provide that no damage should happen, but only a duty to see that reasonable skill and care are exercised in the operation, and Lord Fitzgerald, while admitting that the law was tending in the direction of treating parties engaged in such operations as insurers of their neighbours, thought it had not yet reached that point. These *dicta*, however, were unnecessary to the decision, and seem to be unsupported by any earlier authority; while the suggestion, which the proposition that the duty is not absolute involves, namely, that a house-owner who, knowing nothing about building, when employing a competent professional builder to rebuild his house for him, is bound to superintend the work and dictate to the builder as to how the work should be executed, is open to obvious objections.

A person who brings and keeps upon his land some foreign matter which is likely to do damage if it escapes, does so at his peril (b), and consequently he cannot excuse himself for the escape on the ground that he had employed a competent contractor to place and confine the matter in the position from which it escaped; therefore, where the owner of the house employed a contractor to fix on it a lamp overhanging the footway, and in consequence of the insecureness of the fastening the lamp fell and did damage, the owner was held responsible (c). There is obviously *primâ facie* nothing more dangerous in the fixing of a lamp over a footway than in placing luggage on the top of an omnibus which has to pass through the crowded streets; and yet if the owner of a portmanteau deliver it to a railway company to be carried on their omnibus through the streets, and owing to its being insecurely fastened it falls and injures a passer-by, the owner will clearly not be liable. A comparison of these two cases compels to the conclusion that, in considering whether in similar cases the employer is liable for the negligence of the contractor, the true test is not whether the work that the latter is employed

Bringing
foreign
matter on
to employers'
land.

(a) See Ch. XV. and cases there cited.

(c) *Turley v. Ashton*, (1876) 1 Q. B. D.

(b) *Rylands v. Fletcher*, (1868) L. R. 314.

3 H. L. 330.

employed a sub-contractor to erect a scaffolding for that purpose, and the sub-contractor's workmen improperly caused a pole of the scaffolding to project over the footway, whereby the plaintiff fell over the pole in the dark and was injured, can no longer be regarded as good law. But the distinction between fixed and moveable property, as regards the obligations respectively attaching to their ownership, nevertheless holds good in respect of the two classes of cases coming within the principles of *Tarry v. Ashton* and *Pickard v. Smith* (a).

The keeping of beasts, fire, and explosives.

Although in general the owner of moveable property which escapes from some place elsewhere than his own land and does damage is not liable in the absence of negligence (b), it is otherwise in the case of beasts *feræ naturæ*, in the case of fire, such as that of locomotive engines, and probably also in the case of explosives (c); moveables of such description the owner apparently keeps at his peril, not merely when they are on his land, but whatever the place from which they escape may be. Therefore it is apprehended that if the owner of a savage beast employ a contractor, such as the Zoological Society, to keep the beast for him, and through the negligence of the contractor's servants it escapes, the owner would on principle be liable; and similarly a consignor of nitro-glycerine or some other unstable explosive by railway would presumably be liable if an explosion occurred while the goods were *in transitu*; but these questions have never yet directly arisen for decision (d).

Where contractor employed to execute work which employer is under statutory obligation to execute.

2. The second class of cases in which an employer is liable for the negligence of a contractor is, as above stated, where the employer, being under a statutory obligation to do some particular act, has delegated the performance of his duty to the contractor, and the contractor has failed to perform it (e). Thus where a statute imposed a duty upon the defendants of making a bridge that would open in a particular way, and they employed a contractor who made a bridge that would not open in the manner

(a) pp. 106 and 107, *supra*.

(b) See, however, *Snee v. Durkie*, (1903) 6 F. 42, Ct. of Sess.

(c) See Ch. XV.

(d) *Farrant v. Barnes*, (1862) 11 C. B. N. S. 553; *East India R. Co. v. Kalidas Mukerjee*, (1901) A. C. 396, P. C.

(e) *A fortiori* the same rule, as to liability, applies where the particular act complained of was not necessarily ancillary to, but in excess of, the statutory powers, *Tilling, Ltd. v. Dick, Kerr & Co.*, (1905) 1 K. B. 562.

required, they were held to be nevertheless responsible for the non-discharge of their duty (a). Similarly, where the defendants, being empowered by statute to make a drain across a highway, but being also required by the same statute to reinstate the road properly after the drain was made, employed a contractor to do the work, who neglected to reinstate the road properly, whereby damage happened, the defendants were held liable (b), it being "an implied condition of statutory powers that, when exercised at all, they shall be executed with due care" (c).

The Court in that case also intimated that even if there had not been an express provision in the statute requiring the defendants to properly reinstate the road, they would still have held them liable, upon the ground that there was also an *implied* statutory obligation to do it, for that a section which authorises the making of a drain implies that the duty to fill it up is also imposed (d). It was apparently upon this principle that Lindley and Rigby, L.JJ., proceeded in the case of *Hardaker v. Idle District Council* (e). There the defendants being about to construct a sewer in a street under powers conferred upon them by the Public Health Act, 1875, employed a contractor to construct it for them. In order to execute the work he had to remove the soil under a gas-pipe. Owing to his neglect to securely pack the soil under the gas-pipe after the sewer was made, the gas-pipe broke, whereby the gas escaped into the plaintiff's house and there exploded. The defendants were held responsible (f).

3. The third class of cases is where the contractor is employed to do some work which is altogether unlawful in itself. If, as

Where contractor employed to do something *per se* unlawful.

(a) *Hole v. Sittingbourne R. Co.*, (1861) 6 H. & N. 488.

(b) *Gray v. Pullen*, (1864) 5 B. & S. 970; cp. *Peachey v. Rowland*, (1853) 13 C. B. 182; and see *Shoreditch Corporation v. Bull*, (1904) 90 L. T. 210, H. L.

(c) *Sanitary Commissioners of Gibraltar v. Orfila*, (1890) 15 App. Cas. 400, at p. 411.

(d) See *per* Erle, C.J., 5 B. & S. p. 984.

(e) (1896) 1 Q. B. 335.

(f) Rigby, L.J., while holding that

the defendants were liable even on the assumption that the person whose negligence was complained of was a contractor, was of opinion that his relation to the defendants was, in fact, that of a servant. Smith, L.J., agreed with Lindley, L.J., in holding that the negligent person was a contractor, but he held the defendants liable upon a different ground; he apparently assented to the distinction between employment to do work which is, and employment to do work which is not, *prima facie* dangerous, and cited with

Where a person ratifies the act of one who, though without authority, professed to act as his agent, such ratification will usually relate back to the time of the act done, so that if the act was one which, though unlawful if done without the authority of the principal, might have been lawfully done with such authority, the effect of ratification will be to divest the plaintiff of the cause of action which till then he has got against the professed agent (a). Where one professes to distrain as bailiff for another "it is sufficient for the defendant in his cognisance to say generally 'as bailiff of J. S.' without showing his authority, and a subsequent agreement by J. S. to the distress amounts to an authority as much as if he had previously directed the defendant to distrain" (b). And this holds good equally whether the principal be a subject of the Crown (c). Similarly ratification by the plaintiff of the act of a professed agent may deprive the defendant of a vested defence. Thus if one person without authority issues a writ on behalf of another in order to prevent the operation of a Statute of Limitations, and that other ratifies his act after the time limited by the statute has expired, the effect will be to divest the defendant of the defence that till then he had got that the Statute of Limitations had run (d).

Liability of agent.

An agent who directly commits a tort is always personally liable; he cannot justify himself by pleading the authority or direction of his principal. And this even holds good where the principal is the Crown itself, for the maxim that the Crown can do no wrong affords no protection to its agents (e).

(a) But see *Bird v. Brown*, (1850) 4 Ex. 786.

(b) *Potter v. North*, (1669) 1 Wms. Saund. 347 (c), note 4. See, too, *Whitehead v. Taylor*, (1839) 10 A. & E. 210.

(c) *Buron v. Denman*, (1848) 2 Exch. 167.

(d) See *Shaw, Saville & Albion Co. v. Timaru Harbour Board*, (1890) 15 App. Cas. 429, where, a colonial Court

having held that ratification of notice of action after the time for giving it had expired was too late, the Privy Council, after hearing an appeal against that decision, proceeded to hear a cross appeal upon the merits, which would have been unnecessary had they thought the appeal to be ill-founded.

(e) See above, pp. 40-41.

PARTIES.

PETITION OF RIGHT FOR TORT (a).

The absoluteness of the rule that a petition of right will not lie for a tort has been broken into by the provisions of the Exchequer Court Act of Canada, 50 & 51 Vict. c. 16 (Can.), 1887, of which the following sections are pertinent to this matter.

Interpretation.—1. (c) The expression "The Crown" means the Crown in the right or interest of the Dominion of Canada.

16. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(a) Every claim against the Crown for property taken for any public purpose.

(b) Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

(c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

(d) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

(e) Every set-off, counter-claim, claim for damages, whether liquidated or unliquidated, or other demand whatsoever on the part of the Crown against any person making claim against the Crown.

Sect. 23. Any claim against the Crown may be prosecuted by petition of right or may be referred to the Court by the head of the Department in connection with the administration of which the claim arises, and if any such claim is so referred no fiat shall be given on any petition of right in respect thereof.

GOVERNMENT RAILWAYS AND WORKS: GENERAL RULE.

The general rule that a petition of right does not lie against the Crown for tort has been frequently applied in Canada. Thus the Government ownership of the intercolonial and other railways has produced a number of claims such as commonly afflict railways in exercising their duties and rights of carrying and expropriation. The statutes defining these duties and rights usually provide remedies for persons suffering damage. Apart from statutory remedies and the Exchequer Court Act actions cannot be maintained against the Crown for claims founded in tort.

Government Railways: Expropriation.—The Intercolonial Railway Act, 31 Vict. c. 13 (Can.), gives a power of expropriation, and in *Halifax City R. W. Co. v. The Queen* (b), the suppliants

(a) See p. 40, *supra*.

responsible for repair of boundary

(b) 2 Ex. C. R. 433; cf. *Simoneau v. The Queen*, 2 Ex. C. R. 391, Crown not

ditches; *Morin v. The Queen*, 20 S. C. R. 515.

DEFECT IN PLANT.

Ontario.

Common Law.—"At common law the employer is not bound in person to execute the work in connection with his business, but he is bound, if he does not personally superintend and direct the work, to select proper and competent persons to do so, and to provide them with adequate materials and resources for the work, and having done this he has done all that he is bound to do, and for the negligence of persons so selected he is not answerable" (a).

"One of the duties flowing from this obligation of the employer is to take due and reasonable care that machinery which if out of order will cause danger to his employee is safe and in such a condition that the employee may use it properly without incurring unnecessary danger. What is due and reasonable care is one of degree in each case, and depends upon the nature of the machinery, its liability to get out of order, and the danger incurred by the employee if he is suffered to use it when not in a condition to be safely used" (b).

Change effected by Statute.—"The purpose of sub-s. 1 of s. 3 and sub-s. 1 of s. 6 (c) was, in my opinion, to take from the employer this immunity from liability for the neglect of the person to whom he has entrusted the duty of providing and maintaining in proper condition the appliances for the work in which his employees are engaged, but it was not intended otherwise to affect the common law liability of the employer, and that it does not do so" (d).

It was formerly said that a defect must be an inherent defect—a deficiency in something essential to the proper use of the machine (e). But where a guard is called for under the provisions of the Factories Act the failure to furnish one is *per se* evidence of negligence (f).

A machine fit for one purpose may be defective by being applied for another purpose (g), or from its position and collocation (h).

(a) *Per* Meredith, C.J., in *Schwood v. Michigan Central R. W. Co.*, 9 Ont. L. R. at p. 91 (1905), citing *Wilson v. Merry*, L. R. 1 Sc. App. 332.

(b) *Ibid.*, citing *Murphy v. Phillips* (1876), 24 W. R. 647; see *Black v. Ontario Wheel Co.*, 19 O. R. 578, distinguishing *Murphy v. Phillips*, *supra*.

(c) Workmen's Compensation for Injuries Act, R. S. O. 1897, c. 160.

(d) *Ibid.*; see *Canadian Coloured Cotton Mills Co. v. Talbot*, 27 S. C. R. 198, negligence of loom-fixer.

(e) *Hamilton v. Groesbeck*, 18 A. R. 437, lack of guard to saw; but see comment of Lister, J.A., on this case in

Wilson v. Owen Sound Current Co., 27 A. R. 328 (1900).

(f) *Thompson v. Wright*, 22 O. R. 127; cf. *O'Connor v. Hamilton Bridge Co.*, 24 S. C. R. 598, guard to a drill; *Finlay v. Miscampbell*, 20 O. R. 29, plaintiff going for drink and falling in unguarded hole; *Rodgers v. Hamilton Cotton Co.*, 23 O. R. 425, unguarded cogs; *Dean v. Ontario Cotton Mills Co.*, 14 O. R. 119, unguarded vats.

(g) *Wilson v. Owen Sound Portland Cement Co.*, 27 A. R. 328.

(h) *McCloherly v. Gale Manufacturing Co.*, 19 A. R. 117.

Omission of Statutory Duty.—See *Curran v. Grand Trunk Ontario R. W. Co.* (a); *Washington v. Grand Trunk R. W. Co.* (b).

Evidence of Defect.—See *Black v. Ontario Wheel Co.* (c); *Bridge v. Ontario Rolling Mills Co.* (d); *Plant v. Grand Trunk R. W. Co.* (e); *Canadian Coloured Cotton Mills Co. v. Kerrin* (f); *Badgerow v. Grand Trunk R. W. Co.* (g); *Wilson v. Boulter* (h); *Brunell v. Canadian Pacific R. W. Co.* (i); *Farmer v. Grand Trunk R. W. Co.* (k); *Badcock v. Freeman* (l).

"A master performs his duty when he furnishes machinery of ordinary and reasonable safety, and reasonable safety means safe according to the usages, habits, and ordinary risks of the business. Employers are liable for the consequence, not of danger, but of negligence; no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed" (m).

See *British Columbia Mills Co. v. Scott* (n).

Alberta and
Saskatchewan.
British
Columbia.

Where the work was dangerous and the defendants failed to provide proper plant and a reasonably safe place for the work the plaintiff was held entitled to recover (o).

Nova
Scotia.

A master not personally superintending the repair of his mill machinery is bound to select competent persons to do so and to supply them with adequate materials for the purpose (p).

New
Brunswick.

DEFECT IN "WAYS."

See *Headford v. McClary Manufacturing Co* (q); *Stride v. Diamond Glass Co.* (r); *Ferguson v. Galt Public School Board* (s); *Caldwell v. Mills* (t).

(a) 25 A. R. 407, no defence that non-observance of duty due to negligence of fellow-servant.

(b) 28 S. C. R. 184 (1899), A. C. 275, omission to pack railway frogs.

(c) 19 O. R. 578, bolts defective.

(d) 19 O. R. 731, too long a bolt.

(e) 27 U. C. R. 78, brake defective through negligence of brakeman; (common law).

(f) 29 S. C. R. 478, there must be evidence that the accident caused by the negligence charged.

(g) 19 O. R. 191, mere conjecture.

(h) 26 A. R. 184, inferences that may be drawn.

(i) 15 O. R. 375, burst boiler.

(k) 21 O. R. 299, brakeman killed by projecting lumber; cf. *Toronto R. W. Co. v. Bond*, 24 S. C. R. 715, buffers of different heights held no protection.

(l) 21 A. R. 633, admissibility of ex-

pert testimony as to cause of accident.

(m) *Patton v. Alberta Railway and Coal Co.*, 2 Terr. L. R. 438 (1897), McGuire, J., citing *Titus v. Bradford B. & K. R. Co.*, 136 Pa. 618 (1890).

(n) 24 S. C. R. 702, uncovered cogs in a mill; cf. *Booker v. Wellington Colliery Co., Ltd.*, 9 B. C. R. 265, lack of statutory manholes.

(o) *Oliver v. Dominion Iron and Steel Co.*, 37 N. S. R. 183 (1904), per Townshend, J.

(p) *Baird v. Dann*, 33 N. B. R. 156 (1895).

(q) 24 S. C. R. 291, falling into hoist hole.

(r) 26 O. R. 270, public street not a "way."

(s) 27 A. R. 480, when a gangway is not a "way."

(t) 24 A. R. 462, when a plank is a "way."

NOTICE OF DEFECT TO MASTER.

General.—Notice of defect to the employer or his manager will not relieve the servant from the effects of his own carelessness. "It is a case where it was perfectly in the power of the servant, by keeping his eyes open, to guard himself against a possible danger of which he was fully aware. If by not doing so he suffers injuries he must take the consequences of his own neglect" (a).

At common law a workman was not precluded from obtaining compensation for injuries received by reason of defective machinery, or a defective system of using the same, by reason of his failure to give notice to the employer of such defect (b).

NEGLIGENCE OF SUPERINTENDENT.

Ontario.

"If while in obedience to orders injury arises through the negligence of the one giving the order it is sufficient. No specific order at the time of the injury is requisite; general prior orders suffice" (c).

The failure of a foreman to give a warning that he was accustomed to give constitutes negligence (d). See also *Kelly v. Davidson* (e).

Superintendency is not inferred because one workman presuming on greater length of service or skill directs his fellow-workman to do certain work in an unsafe manner and injury results (f).

British
Columbia.

"In order to make out a case of negligence by defendants it must appear either that defendants had a defective system which did not bring home notice of defect to some person authorised to see to its proper repair, or, if the system did provide for notice to such person, that he was notified and failed to have the defect remedied, and that he was not a co-employee of plaintiff, but the representative of defendant" (g).

Nova
Scotia.

Where the regulations were in the hands of an official, but by his neglect there was a failure to fence off and inspect an unused

(a) *Dominion Iron and Steel Co. v. Day*, 34 S. C. R. 387 (1904), per Sir E. Taschereau, C.J., reversing 36 N. S. R. 113; cf. *Truman v. Rudolph*, 22 A. R. 250; *Pott v. Hewitt*, 23 O. R. 619; *Ross v. Cross*, 17 A. R. 29, knowledge of danger; *Rudd v. Bell*, 13 O. R. 47; *Miller v. Reed*, 10 O. R. 419.

(b) *Webster v. Foley*, 21 S. C. R. 580.

(c) *Cox v. Hamilton Sewer Pipe Co.*, 14 O. R. 300 (1887), per Boyd, C.; cf. *Madden v. Hamilton Iron Forging Co.*, 18 O. R. 55, plaintiff obeying from fear of dismissal.

(d) *Choate v. Ontario Rolling Mill Co.*, 27 A. R. 155; cf. *British Columbia Mills Co. v. Scott*, 24 S. C. R. 702.

(e) 32 O. R. 8; 27 A. R. 657, negligent replacing of stay by foreman.

(f) See *Garland v. City of Toronto*, 23 A. R. 238; 27 O. R. 154; cf. *Carnahan v. Robert Simpson Co.*, 32 O. R. 328, elevator man not a superintendent, but a fellow-servant.

(g) *Morgan v. British Yukon Co.*, 1 West L. R. 295 (1905), per Hunter, C.J., case of bursting of capstan.

place and a workman was killed by an explosion, held due to the negligence of a fellow-workman (a). Nova Scotia.

BOUND TO CONFORM (b).

See *Ferguson v. Galt Public School Board* (c); also article in Ontario Canada Law Journal (d).

"Where the plaintiff conformed to an order of his superintendent and suffered from a cave in a mine, resulting from circumstances of which he was not aware, but the superintendent was aware, the defendants were held liable" (e). British Columbia.

Where the plaintiff, at the request of a gate man to whose orders he was not bound to conform, did something not part of his duty and was hurt, he was held guilty of contributory negligence (f). Nova Scotia.

Where plaintiff was aware of the dangerous circumstances of the work, but felt obliged to do it under the peril of dismissal if he disobeyed, he was held not guilty of contributory negligence (g).

NEGLIGENCE OF PERSON IN CHARGE OR CONTROL.

See *Snell v. Toronto R. W. Co.* (h). Ontario.

"IN OBEDIENCE TO THE RULES" (i).

General.—See article in 39 Canada Law Journal, 6 (1903).

Where the plant was in good shape, and the deceased was on the "haulage way" contrary to orders, it was held a case of contributory negligence (k). Nova Scotia.

NOTICE OF INJURY OR ACTION (l).

See *Caranagh v. Park* (m); *Mason v. Bertram* (n); *Cox v. Ontario Hamilton Sewer Pipe Co.* (o); also article in 39 Canada Law Journal, 129 (1903).

(a) *Grant v. Acadia Coal Co.*, 319 (1901), case on Mines Regulation Act, R. S. N. S. c. 8, s. 25.

(b) P. 93, *supra*.

(c) 27 A. R. 480, the labourer is not bound to conform to the orders of the mason for whom he is carrying mortar.

(d) 39 C. L. J. 6 (1903).

(e) *Gunn v. Le Roi*, 10 B. C. R. 59 (1903); see judgment of Drake, J., at p. 63.

(f) *Macpherson v. MacLachlan*, 36 N. S. R. 435 (1904), per Ritchie, J.

(g) *Olivier v. Dominion Iron and Steel*

Co., 37 N. S. R. 183 (1904), per Townshend, J.

(h) 27 A. R. 151, motor man.

(i) P. 93, *supra*.

(k) *Howie v. Dominion Coal Co.*, 37 N. S. R. 111 (1904).

(l) P. 95, *supra*.

(m) 23 A. R. 715, how defect in notice to be pleaded, followed in *Wilson v. Owen Sound Portland Cement Co.*, 27 A. R. 328.

(n) 18 O. R. 1, what signature required.

(o) 14 O. R. 300, sufficiency of lawyer's letter.

British
Columbia.

Want of notice; inability to transact business an excuse (a).

TRIAL PRACTICE IN CASES UNDER EMPLOYERS' LIABILITY ACT (b).

General.—See *Garland v. Toronto* (c); *Farmer v. Grand Trunk R. W. Co.* (d); *Reid v. Barnes* (e).

Under the English Employers' Liability Act the servants of a contractor are not entitled to sue the principal employer. Ontario and British Columbia have adopted special provisions relieving such servants from this disability (f).

The finding of a jury cannot be ignored even though the preponderance of reason is in favour of the opposite view (g).

INDEPENDENT CONTRACTOR (h).

Ontario.

The same principles have been followed in Ontario as in England and the United States (hh); and the law, if in any danger of being lost, might be deduced from Ontario cases. Thus *Woodhill v. Great Western Railway Co.* (i) gives us the general rule: "Where parties enter into a contract which is in itself lawful and the contractor in carrying on his work does anything injurious to another, he alone is responsible."

The test of independent contractorship, namely, the *power of controlling the servant* (k), has been applied in *Saunders v. City of Toronto* (l); in which it was suggested by Osler, J.A., that the true criterion was whether the alleged master had the power of control "in respect to anything not necessarily involved in the proper doing of the work."

WORK DONE AT PERIL OF OWNER (m).

Independent Contractor burning Scrub.—It has been held in Ontario that a railway company was not liable for injuries

(a) *Lever v. McArthur*, 9 B. C. R. 417.

(b) P. 95, *supra*.

(c) 23 A. R. 238 (1896), onus of proof.

(d) 21 O. R. 299 (1891).

(e) 25 O. R. 223, general verdict by jury.

(f) See R. S. O. 1897, c. 160, s. 4, (1) b.

(g) *Williams v. Bartling*, 29 S. C. R. 548 (1899), affirming 30 N. S. R. 548. In this case the jury found there was no negligence. This is an instance of the characteristic vagueness of evidence in negligence cases, and is mentioned by Gwynne, J., in his dissentient judgment

as "a painful instance of the miscarriage of justice"; cf. *St. John Gas Light Co. v. Hatfield*, 23 S. C. R. 164.

(h) P. 101, *supra*.

(hh) See the very exhaustive 280-page monograph on the "Liability of an Employer for the Torts of an Independent Contractor"; 40 C. L. J. pp. 529-668, and 41 C. L. J. (1905), pp. 49-187.

(i) 4 U. C. C. P. 449 (1855); cf. *Lennon v. Harrison*, 7 U. C. C. P. 496 (1858), contractor held personally responsible.

(k) P. 102, *supra*.

(l) 26 A. R. 265 (1899).

(m) P. 106, *supra*.

caused by fire which spread to adjoining land from the timber or brushwood which a contractor was burning on its right of way (a). The clearing of land by fire is recognised (under certain precautions) in the Act to preserve the forests from destruction by fire (b).

Withdrawal of Support.—Where owing to the negligence of the contractor the neighbour's wall fell the employer was held liable; for the damage arose, not in a matter collateral to, but in the performance of the very act contracted for (c).

WORK WHICH EMPLOYER UNDER STATUTORY DUTY TO EXECUTE (d).

General.—In *Halifax v. Lordly* (e) the Court recognised the principle that “where a particular duty is imposed upon any person as incidental to the doing of any work which he by statute is authorised to do, such person cannot, by employing a contractor to do the work authorised, evade responsibility to a person injured by the non-fulfilment of the incidental duty imposed.”

WHERE WORK *PER SE* UNLAWFUL (f).

General.—Where an erection was made contrary to a municipal by-law, the Supreme Court of Canada, *per* Ritchie, C.J., said: “The owner for whom and at whose instance the work was done, the owner's agent who superintended and directed and paid for the work . . . together with the parties who were employed to do the work, are equally responsible” (g).

Effect of Interference by Employer's Engineer.—See *Murphy v. Ontario City of Ottawa* (h).

(a) *Woodkill v. Great Western R. Co.*, 4 U. C. C. P. 449 (1855). Cf. *Carroll v. Corporation of Plympton*, 9 U. C. C. P. 345, clearing road allowance by fire, not liable; *Johnston v. Hastie*, 30 U. C. R. 232, clearing farm by fire, employer liable under circumstances; *Gillson v. North Grey R. W. Co.*, 33 U. C. R. 128; 34 U. C. R. 475, clearing railway right of way, contractor (not railway) liable under circumstances.

(b) R. S. O. 1897, c. 267, ss. 4, 5.

(c) *Wheelhouse v. Darch*, 28 U. C. C. P. 369 (1877); *Bower v. Peate*, L. R. 1

Q. B. 321; and *Butler v. Hunter*, 7 H. & N. 826, commented on.

(d) P. 108.

(e) 20 S. C. R. 505 (1892), case of electric light going out and injury by collision with hydrant.

(f) P. 109, *supra*.

(g) *Walker v. McMillan*, 6 S. C. R. at p. 266 (1882); followed *Re Spears*, 11 S. C. R. 113.

(h) 13 O. R. 334 (1887), distinguished *Ferguson v. Roblin*, 17 O. R. 167; see

also *Gillson v. North Grey R. W. Co.*, 33 U. C. R. 128; 34 U. C. R. 475

Ontario.

Remedy of Employer against Contractor.—See *McCann v. City of Toronto* (a).

Selection of Competent Serrant.—A master may, at common law, delegate to a competent person the duty of selecting fellow workmen or servants (b).

(a) 28 O. R. 650.

(b) *Wilson v. Hume*, 30 U. C. C. P. 542; cf. *Dererell v. Grand Trunk R.*

W. Co., 25 U. C. R. 517, allegation that defendants negligently employed an incompetent person for switchman.

CHAPTER III.

FELONIOUS TORTS.

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WHERE an act is at once a tort and a felony or misdemeanour, it is not proper that the injured party should be allowed to pursue his own private remedy in preference to furthering the ends of public justice. He has first to do his duty by prosecuting the felon, and it is only after this has been done that he can obtain compensation in an action of tort. It was at one time supposed that there could not be a double proceeding in respect of the same act. The felony, it was said, "drowns the particular offence and private wrong" (a). This doctrine of the merger of the tort in the felony prevailed for a considerable time, and was apparently accepted both by Lord Eldon (b) and Mr. Justice Buller (c). However, in a very early case it was held that after a successful prosecution for felony an action of trespass might be brought in respect of the same wrong (d), and the rule now is that the private remedy is not merged, but is only suspended until the injured party has performed his public duty; the sole object of the law being to guard against the stifling of prosecutions (e). In the case of *Ex parte Ball* (f), the majority of the Court of Appeal hinted some doubt as to this rule, but with this exception the general current of modern authority is uniform. The difficulty arises as to the manner in which the rule is to be enforced. It is clear that where a plaintiff is able to make out a case without necessarily proving or alleging a felony, it is

Duty to prosecute felon before bringing action.

Tort once supposed to be merged in felony.

Remedy now only suspended.

How duty to prosecute enforced.

(a) <i>Higgins v. Butcher</i> , (1606) Yelv. 89.	Styles, 346.
(b) <i>Cox v. Paxton</i> , (1810) 17 Ves. 329.	(e) <i>Stone v. Marsh</i> , (1827) 6 B. & C. 551; <i>Marsh v. Keating</i> , (1833-4) 1 Bing. N. C. 198; <i>Wells v. Abrahams</i> , (1872) L. R. 7 Q. B. 554; <i>Appleby v. Franklin</i> , (1886) 17 Q. B. D. 93.
(c) <i>Master v. Miller</i> , (1791-3) 4 T. R. p. 332.	(f) (1879) 10 Ch. D. 667, C. A.
(d) <i>Dawkes v. Coreneigh</i> , (1652) C.T.	

Defendant
may not set
up his own
felony.

Action should
be stayed
where felony
disclosed.

not open to the defendant to try and blacken his own character by contending that his act was in truth felonious. *Nemo allegans turpitudinem suam est audiendus* (a). This maxim, however, does not apply where the plaintiff's own case discloses the felony (b). Where it does so on the face of the pleading, the defendant was formerly allowed to demur (c); but this probably proceeded on the notion that the felony operated as a bar and not a suspension, and it has since been held that a statement of claim disclosing a felony as the cause of action is not demurrable (d). The proper course would appear to be to apply to have the action stayed. Considerable difficulty arises as to what ought to be done where the felony is for the first time disclosed on the plaintiff's evidence at the trial. In *Wellock v. Constantine* (e) the declaration alleged that the defendant assaulted the plaintiff and violated and carnally knew her. The defendant simply pleaded not guilty, and at the trial on objection taken, the judge (f) ruled that either the plaintiff had consented or the defendant was guilty of the felony of rape, and in neither case would an action lie; and the plaintiff consented to a nonsuit. The nonsuit was subsequently upheld (g). In a later case, *Wells v. Abrahams* (h), the plaintiff having recovered in trover against the defendant, a new trial was moved for on the ground that the evidence tended to prove against the latter a theft of the chattel in question in the action, and that a prosecution was in fact pending. The rule was discharged, and *Wellock v. Constantine* was dissented from. It was said that a judge at assize was simply a commissioner with no power to try anything but the issue on the pleadings; but the force of this argument has been

(a) *Stone v. Marsh*, (1827) 6 B. & C. p. 564.

(b) See *per Cur.*, *Gibson v. Minet*, (1791) 1 H. Bl. p. 612.

(c) *Cox v. Paxton*, (1810) 17 Ves. 329. See, too, *Higgins v. Butcher*, (1606) Yelv. 89.

(d) *Roupe v. D'Avigdor*, (1883) 10 Q. B. D. 412. The Court considered that there was no precedent for such a demurrer, but this seems erroneous: see above. In *Midland Insurance Co. v. Smith*, (1881) 6 Q. B. D. 561, it was

said that in order to render a statement of claim demurrable it must appear not merely that there was a felony, but that it was unprosecuted.

(e) (1863) 2 H. & C. 146.

(f) Willes, J.

(g) By Pollock, C.B., and Bramwell, B., Martin, B., diss. In *Ex parte Ball*, (1879) 10 Ch. D. 657, Bramwell, L.J., clearly indicates his disapproval of this case.

(h) (1872) L. R. 7 Q. B. 554.

taken away by the provisions of the Judicature Act (*a*), giving all judges sitting at *nisi prius* the full powers of the Court, and it would seem, therefore, that there is now no objection to a judge at the trial *staying* the action if he is fully satisfied that the case for the plaintiff discloses a felony. The question is one for himself and not for the jury (*b*). It was further suggested in *Wells v. Abrahams* that it is competent to the Attorney-General at any time to inform the Court if an action is depending the facts of which afford a basis for a prosecution of felony, and that the Court can thereupon stay further proceedings.

There is no impediment in the way of a party obtaining compensation for an unprosecuted felonious act where he has failed to prosecute through no default or lack of reasonable diligence on his part, as where the alleged felon dies or escapes from jurisdiction (*c*). If a prosecutor colludes to procure the acquittal of the person whom he charges with felony, it would seem that he ought not afterwards to be allowed to maintain an action in respect of the same wrong (*d*).

There is further no impediment to a person injured by a felonious act bringing his action before prosecution, unless he is the person whose duty it was to prosecute (*e*). In *Appleby v. Franklin* (*f*) the plaintiff sued for the seduction of her daughter, and further alleged that the defendant had administered drugs to procure abortion. Application being made to strike out the allegation on the ground that it disclosed a felony, the Court refused, saying that the mother was under no obligation to prosecute.

Where plaintiff is not the person whose duty it is to prosecute.

If a person who has failed to prosecute becomes a bankrupt,

(*a*) 36 & 37 Vict. c. 66, ss. 29, 30, 39.

(*b*) See the Irish case, (1825) *Hayes v. Smith*, Sm. & Bat. 378. In another recent Irish case (*S. v. S.*, (1889) 16 Cox C.C. 566; *A. v. B.* (1889), 24 L. R. Ir. 234), the Court had before them, on an interlocutory application, the pleadings in an action which disclosed a case of unprosecuted felony. The defendant made no application for a stay, and the Court decided not to grant one of their own motion.

(*c*) *Stone v. Marsh*, (1827) 6 B. & C. 551; *Marsh v. Keating*, (1833-4) 1 Bing.

N. C. 198. *Per* Baggallay, L.J., *Ex parte Ball*, (1879) 10 Ch. D. 674. As to escape, see, however, Bramwell, L.J., *ibid.* p. 675. If an indictment is preferred but not proceeded with by the direction of the judge at the trial it is enough (*Dudley & West Bromwich Banking Co. v. Spittle*, (1860) 1 J. & H. 14).

(*d*) *Crosby v. Leng*, (1810) 12 East, 409.

(*e*) *Osborn v. Gillet*, (1873) L. R. 8 Ex. 88.

(*f*) (1886) 17 Q. B. D. 93.

the right of action, if it passes to his trustee at all, passes free from impediment, for the trustee represents the interests of the creditors and not of the bankrupt (a). And the trustee by virtue of his capacity may "bring, institute or defend any action . . . relating to the property of the bankrupt" (b). Executors and administrators are probably in no better position than those whom they represent.

Where
defendant
is not the
felon.

Where out of a felony a cause of action arises not merely against the felon but against some innocent third party, the claim against the latter may be pursued without a prosecution. Thus, an action of trover will lie against the innocent receiver of stolen goods, though the thief be not prosecuted (c). But in cases of larceny by a bailee, under s. 24 of the Sale of Goods Act, 1893, the offender's prosecution to conviction is a condition precedent to the reversion of the property in the original owner (d). And where the felon ought to be joined as defendant with the innocent parties, as where one partner has committed a felony in a partnership transaction, then the principle that there ought first to be a prosecution applies (e).

Personal
representa-
tive of felon.

If a man neglect to prosecute a felon during his lifetime it would seem that he ought not to be allowed to sue his personal representatives in respect of the felony after his death, but it is clearly otherwise if the felony be not discovered during the felon's lifetime, for then there is no default (f).

Statute of
Limitations.

Where the failure to prosecute simply operates as a suspension of the remedy, and the prosecution is not a condition precedent to the bringing the action, it follows that the Statute of Limitations begins to run from the time of the wrongful act.

The Statute does not, however, run in favour of an agent who has fraudulently appropriated the property of his principal (g).

(a) *Ex parte Ball*, (1879) 10 Ch. D. 667; Baggallay, L.J., diss.

(b) The Bankruptcy Act, 1883, s. 57, subs. 2.

(c) *White v. Spettigue*, (1845) 13 M. & W. 603. See, too, *Osborn v. Gillet*, (1873) L. R. 8 Ex. 88.

(d) In cases of fraud not amounting to felony, the goods, upon conviction of the offender, do not necessarily revert

in the prosecutor. Sale of Goods Act, 1893, s. 24, subs. 2; and see *Rex v. Walker*, (1901) 65 J. P. 729.

(e) See *Stone v. Marsh*, (1827) 6 B. & C. p. 564.

(f) *Wickham v. Gatrill*, (1854) 2 Sm. & G. 353.

(g) *North American Land and Timber Co. v. Watkins*, (1904) 2 Ch. 233.

It is to be observed that there is no fetter on the right of action where the alleged tort is also a misdemeanour. The difference may possibly arise from the fact that there being no forfeiture for misdemeanours, the Crown had the less interest in enforcing their prosecution.

Torts that
are mis-
demeanours.

Canadian Notes to Chapter III.

FELONIOUS TORTS.

IS RULE AFFECTED BY CRIMINAL CODE?

The Criminal Code provides (s. 535) for the abolition of the distinction between felony and misdemeanour, and also provides : " 534. After the commencement of this Act (a) no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence." Doubt has been thrown by a Quebec case (b) upon the sufficiency of this section to bind a civil Court in a province. It will be better, therefore, to refer to the previous decisions on the subject of felonious torts.

Sect. 799 provides that a person dismissed or convicted under Part LV. of the Code (Summary Trial of Indictable Offences) " shall be released from all further or other criminal proceedings for the same cause " (c).

Sects. 864—866 deal with summary remedies for assaults.

Sect. 866 provides that a person dismissed or convicted (and paying the penalty) " shall be released from all further or other proceedings, civil or criminal, for the same cause " (d).

RULE NOT APPLICABLE TO CROWN.

OLDER DECISIONS.

The rule which prevents a civil remedy being taken whilst the prosecution for the felony is not concluded does not apply where the Crown is the plaintiff in the civil suit (e).

(a) July 1st, 1893. See *Major v. 588 (1897).*

McCraney, 29 S. C. R. 182 (1898), as to application to acts done before that date.

(b) *Paquet v. Laroie* (1898), R. J. Q. 7 Q. B. 277.

(c) This section does not bar civil remedy : *Nevills v. Ballard*, 28 O. R.

(d) Held *intra vires*, *Flick v. Brisbn* 26 O. R. 423 (1895). This section does not apply to the case of a plaintiff who did not prefer the criminal complaint : *Miller v. Lea*, 25 A. R. 428 (1898).

(e) *Regina v. Reiffenstein*, 5 P. R. 175.

CHAPTER IV.

FOREIGN TORTS.

Conditions on which foreign torts are actionable here.

TORTS committed abroad, other than injuries to interests in land, have always been triable in this country (a) provided they fulfilled the following two conditions. First, the wrong must be of such a character that it would have been actionable if committed here. Therefore, where a collision was caused in Belgian waters by the negligent navigation of a pilot whom by the law of Belgium the shipowner was compelled to employ, it was held that no action would lie here against the shipowner, although by the Belgian law he was responsible notwithstanding that the pilotage was compulsory (b). Secondly, the act must not have been justifiable by the law of the place where it was done.

Nor is action maintainable, in this country, to enforce a contract, valid in a foreign country, if such contract were procured by methods antagonistic to public policy as interpreted by English Courts of Justice (c). No action will lie here for an act committed in a foreign country if it either was lawful by the law of that country at the time of its commission (d), or was subsequently rendered lawful by relation by virtue of *ex post facto* legislation in such country (e). In order to found an action here, however, it is not necessary that the wrong should have been *actionable* where committed ; it is sufficient if it was *unlawful* (f). Thus a plea to an action of assault committed at Naples that by the Neapolitan law the defendant was liable only to criminal proceedings and was not civilly answerable in damages, was held bad (g).

(a) *Mostyn v. Fabrigas*, (1774) 1 Cowp. 161.

(b) *The Halley*, (1868) L. R. 2 P. C. 193.

(c) *Kaufman v. Gerson*, (1904) 1 K. B. 591, C. A.

(d) *Blad v. Bamfield*, (1674) 3 Swanst. 604; and see *Embiricos v. Anglo-Austrian Bank*, (1905) 1 K. B. 677.

(e) *Phillips v. Eyre*, (1870) L. R. 6 Q. B. 1.

(f) *Machado v. Fontes*, (1897) 2 Q. B. 231, C. A.

(g) *Per Wightman, J., Scott v. Lord Seymour*, (1862) 1 H. & C. p. 234. Willes and Blackburn, JJ., were inclined to agree with him, but in their view of the case it was unnecessary to decide the point.

With regard to foreign statutes of limitations the rule is that if the foreign law touches only the remedy or procedure for enforcing the obligation it is no bar to an action in this country (*a*), but if it extinguishes the right then it is a bar here (*b*).

In the case of torts relating to land situate abroad the Common Law Courts prior to the Judicature Acts would not entertain any action (*c*), but different judges seem to have entertained different views as to the grounds of this refusal. Some thought that it turned on the technical distinction between local and transitory actions, and was a question of venue rather than of jurisdiction (*d*), while others thought that it depended on want of jurisdiction. And consequently when upon the passing of the Judicature Acts local venues were abolished (*e*), it was doubted whether the only fetter upon the trial of actions for such torts was not removed, at all events if the claim was for mere reparation in damages and no question of title was involved. But it has now been finally settled by the House of Lords that the ground upon which the Courts refused to try such action before the Judicature Acts was absence of jurisdiction, and that consequently, notwithstanding the abolition of local venues, an action to recover damages for trespass to land situate abroad will still not lie here (*f*). And it seems that this is so even though no question of title be raised. Nor will it make any difference that the tort was committed in a place where there are no regular tribunals, for, as pointed out by Lord Herschell (*g*), if such an action were allowed an owner who had been ousted from land situate in such country might, after recovering the value of the land as damages here, retake possession by force, and so get both the land and its value.

(*a*) *Huber v. Steiner*, (1835) 2 Bing. N. C. 202.

(*b*) *Per* Willes, J., *Phillips v. Eyre*, (1870) L. R. 6 Q. B. p. 29. For French Statutes of Prescription, see Code Napoleon, 2262 *et seq.*

(*c*) To this rule Lord Mansfield introduced an exception in cases of torts committed in places where there were no regular tribunals (*Mostyn v. Fabrigas*, (1774) 1 Cowp. p. 180). But on

this point he was never followed by any other judge.

(*d*) *Per* Buller, J., *Doulson v. Matthews*, (1792) 4 T. R. 503, and *per* Blackburn, J., *Whittaker v. Forbes*, (1875) 1 C. P. D. p. 53.

(*e*) Ord. XXXVI. r. 1.

(*f*) *British South Africa Co. v. Companhia de Moçambique*, (1893) A. C. 602.

(*g*) *Ibid.* p. 625.

NEGLIGENCE IN FOREIGN JURISDICTION (a).

Ontario. An action may be brought in Ontario for negligence occurring in another province (b).

ACT COMMITTED PARTLY IN FOREIGN JURISDICTION.

British Columbia. Where the defendant acting under orders of the Hawaiian Government received the plaintiff aboard (against his will) and deported him to Vancouver, it was held that the justification afforded by a defence of agency for a responsible Government in the execution of an act of State only extends to acts done within the territorial jurisdiction of that State (c).

Ontario. Where criminal proceedings were begun in Quebec, the plaintiff arrested in Ontario and taken to Montreal and discharged, the proceedings were held to constitute one entire tort founded on transactions in Quebec, and the plaintiff was not allowed to sue in Ontario (d).

In an action for wrongful dismissal where the defendants resident in Quebec there wrote and posted to the plaintiff in Ontario the letter dismissing him, held that the act complained of took place in Quebec, and Rule 271 (e) (now Con. Rule 162 (e)) was not applicable (e).

PRACTICE IN ONTARIO.

Ontario. *The Practice in Ontario.*—Con. Rule 162 (e) allows service out of Ontario of a writ or notice when the action is founded on a tort committed in Ontario.

Thus a transfer in Ontario of goods constituting a fraudulent preference, although the goods are afterwards removed to Quebec, is a tort committed in Ontario (f).

Where the subject of the suit was the wrongful conversion of a valuable picture, and one defendant W. residing in Ontario obtained the picture there and passed it on to the other defendant O., who was resident in Montreal, held, that if O. knew the terms upon which W. held the picture he might be guilty of a tort, "but that was done in Quebec" (g).

(a) See p. 118, *supra*.

(b) *Tytler v. Canadian Pacific R. W. Co.*, 29 O. R. 654; 26 A. R. 467.

(c) *Cranstoun v. Bird and Huddart*, 4 B. C. R. 569 (1896).

(d) *Oligny v. Bauchemin*, 16 P. R. 508 (1895), case under Con. Rule 162 (e).

(e) *Offord v. Bresse*, 16 P. R. 332 (1894); but see *Bell v. Villeneuve*, 16 P. R. 413 (1895), where the contract of hiring was made in Ontario.

(f) *Clarkson v. Dupré*, 16 P. R. 521 (1895); cf. *Shearman v. Finlay*, 32 W. R. 122, libel written without, but published within, jurisdiction. For the value of a judgment obtained under the practice to bind the defendant abroad, see *Sirdar Gurdigal Singh v. Faridkot* (1894), A. C. 670.

(g) *Rourk v. Wiedenbach*, 1 O. L. R. 581 (1901), *per* Boyd, C.

LANDS SITUATE ABROAD (a).

British South Africa Co. v. Companhia de Moçambique (b) has been followed in Ontario. Where the premises were situate in Manitoba and the plaintiff complained that the defendants allowed fire to spread, whereby his house and furniture were destroyed, it was held that the action, so far as the house was concerned, could not be entertained by the Ontario Court; but *aliter* as to the furniture on abandonment of the claim for the destruction of the house (c).

The fact of the parties residing in Ontario and the deed being executed in Ontario in a case of fraudulent conveyance of lands out of the jurisdiction would not enable the plaintiff to sue in Ontario (d).

The Court has a discretion as to the forum in which the action has to be brought (e).

(a) P. 119, *supra*.

(b) (1893) A. C. 602.

(c) *Brereton v. Canadian Pacific R. W. Co.*, 29 O. R. 57; *Campbell v. McGregor*, 29 N. B. R. 644, not followed.

(d) See *Burns v. Davidson*, 21 O. R. 547 (1892), followed in *Purdom v. Parey*, 26 S. C. R. 412 (1896).

(e) *Atkinson v. Plimpton*, 6 Ont. L. R. 566 (1903).

CHAPTER V.

NOTICE OF ACTION.

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Statutory
authority
must be
strictly
pursued.

IF a party seeks to justify, under the authority of a statute, an act which is *primâ facie* wrongful, he must bring himself within the strict terms of the authority which he pleads, by proving that he did the very thing which he was ordered or permitted to do, and nothing more. If he has mistaken the extent of his powers, or through some misapprehension of fact has sought to apply them in cases where the necessary conditions do not exist, or has followed a wrong procedure, however innocent his intentions or excusable his error, he is none the less liable to make compensation to the persons with whose right he has interfered. Thus an actionable offence is committed by a railway company, when a locomotive engine emits "black smoke," even though the company may have complied with statutory conditions in the construction of their locomotives (a).

And subsequently to January 1, 1908, a railway company, though acting under statutory powers and using all precautions, will be liable (up to 100*l.*) for damage, to agricultural land or crops, arising from sparks or cinders emitted from its locomotive engines (b).

However, a great variety of statutes both public and private afforded a qualified protection to persons who had committed wrongs under a mistaken notion of their powers or duties under such Acts. The protection was twofold. In the first place the period of limitation was greatly shortened; in the second it was a condition precedent to the bringing of an action that notice of action should be given, so that the wrong-doer might have an opportunity of tendering amends. A sufficient tender was a

(a) *South Eastern & Chatham R. Co.* L. T. 632.
v. *London County Council*, (1901) 84 (b) 5 Ed. VII. c. 11.

good defence to the action. Now, however, by the Public Authorities Protection Act, 1893, so much of any public general Act as provides that notice of action is to be given is repealed (a). But notice of action is still necessary under a great many Acts which are not public general, and therefore the topic, though far less important than formerly, has still to be considered. The cases below cited were for the most part decided on repealed sections of statutes the language of which is not always identical. They, however, illustrate the general principles on which notice of action clauses are to be construed (b).

The enactments under consideration are "intended for the benefit of persons who intend to act right but by mistake act wrong" (c). It is therefore indispensable, to entitle a person acting outside his powers to notice of action, that he should at the time have believed that he was acting within them (d); but as to what is necessary to form the foundation of such belief there has been considerable fluctuation in the authorities. In *Kine v. Evershed* (e) it was laid down that, in order to entitle a party to notice, he must in the first place have believed that he was enforcing some definite provision of the law, and secondly, have been reasonable in so believing. It is necessary, said the Court, for defendants to show not merely a "vague opinion of their own power, but a reasonable conviction that they were enforcing the specific provisions of the law in committing the grievance complained of" (f). A series of cases, however, followed, which have made it settled law that a party is not disentitled to notice of action merely by the fact that he acted unreasonably (g).

Who are
entitled to
notice.

Unreasonable
conduct
does not
necessarily
disentitle.

(a) 56 & 57 Vict. c. 61, s. 2. A plaintiff not giving sufficient opportunity to a defendant of tendering amends may be punished by extra costs: *ibid.* s. 1.

(b) As to the period of limitation, see below, p. 176.

(c) *Per* Abbott, C.J., *Parton v. Williams*, (1820) 3 B. & Ald. p. 333.

(d) There may indeed be cases in which a man may be actuated by malice and yet be acting in pursuance of a statute (*Kirby v. Simpson*, (1854) 10 Ex. 352).

(e) (1847) 10 Q. B. 143.

(f) p. 151.

(g) In consequence of the old doctrine about reasonableness the question of a right to notice of action was often confused with the question of reasonable and probable cause for a prosecution (see *per* Willes, J., *Chamberlain v. King*, (1871) L. R. 6 C. P. p. 477), and consequently sometimes treated as a question for the judge. It is now, however, in so far as it bears upon the defendant's belief, clearly a question for the jury, and is so treated in all the recent cases.

Party should have believed that facts existed which afforded a justification.

Unreasonable conduct may afford cogent evidence of a lack of good faith and honest belief, but is not otherwise material (a). Thus in the case of *Booth v. Clive*, a county court judge acted in defiance of a prohibition addressed to him, under the belief that it was his duty so to do, and he was held entitled to notice of action. In such and cognate cases it is, apparently, for the Court to decide whether notice of action is necessary (b), although it is for the jury to decide the question of *bona fides*, on which the defendant's right to such notice depends (c). In some of the judgments in these cases expressions may be found which might be quoted to prove that defendants are entitled to notice when acting on mere "vague opinion of their own power" (d). It is clear, however, that something more definite than this is needed. A defendant may be entitled to notice as acting under a statute of the very existence of which he was ignorant, but to be so entitled he must have believed, however mistakenly, in the existence of facts which would have justified him (e). "Where the question is whether a defendant is entitled to notice of action under an Act of Parliament of this nature, the proper way of leaving the question to the jury is this: 'Did the defendant honestly believe in the existence of facts which, if they had existed, would have afforded a justification under the statute?' . . . It has been contended that it is enough if the defendant *bonâ fide* thought he was acting according to law, and that it is not necessary that he should believe that he was acting under an authority conferred upon him by law. To a certain extent that argument is well founded; that is to say, in order to entitle a defendant to notice of action, it is not necessary that he should know of the existence of the particular enactment. But all difficulty is obviated by the rule of law to which I have

(a) *Booth v. Clive*, (1861) 10 C. B. 827; *Cox v. Reid*, (1849) 13 Q. B. 558; *Gosden v. Elphick*, (1849) 4 Ex. 445; *Read v. Coker*, (1853) 13 C. B. 850; *Wedge v. Berkley*, (1837) 6 A. & E. 663; *Dicta* to the contrary in *Leete v. Hart*, (1868) L. R. 3 C. P. 322, were explained away in *Chamberlain v. King*, (1871) L. R. 6 C. P. 474.

(b) *Kirby v. Simpson*, (1854) 10 Ex.

358; *Arnold v. Hamel*, (1854) 23 L. J. Ex. 137.

(c) *Roberts v. Orchard*, (1863) 2 H. & C. 769, at p. 774.

(d) See particularly *Read v. Coker*, (1853) 13 C. B. 850.

(e) *Hermann v. Seneschal*, (1862) 13 C. B. N. S. 392; *Roberts v. Orchard*, (1863) 2 H. & C. 769.

adverted" (a). Thus s. 103 of the Larceny Act (24 & 25 Vict. c. 96) authorises the arrest of persons found committing certain offences under the Act, and s. 113 entitled a party to notice of action for anything done in pursuance of the Act. If, therefore, an arrest was made under a belief that the person arrested was caught in the act, notice of action had formerly to be given, but if the arrest was not made until some time after the supposed offence had been committed and the supposed offender had got away, there was no right to notice of action, because the defendant could not have believed that the plaintiff was found committing the offence (b).

It is not, however, universally true that it is only where a person has acted wrongly through a mistake of fact that he is entitled to notice of action. It has been frequently decided that if a magistrate, constable, or other person invested with special powers by virtue of his office or position, mistook the extent of those powers, and consequently while intending simply to execute them, acted in a manner unauthorised by the law, he nevertheless could not be sued without due notice. And this was the case whether the mistake arose out of misinterpretation of some particular section of an Act, or a general misapprehension of the extent of power (c).

Notice where the mistake is one of law.

In *Elliot v. Allen* (d) it was indeed held that the defendants as overseers having imprisoned the plaintiff under the authority, as they supposed, of a local Act without following the prescribed procedure, were not entitled to notice as having acted in "pursuance" of the Act, and the Court distinguished *Hazeldine v. Grove*, where under analogous circumstances it was held that notice must be given, because in that case the defendant was entitled to notice "for anything done or omitted to be done in pursuance of this Act or in the execution of the powers and authorities under this Act." It may be doubted, however,

(a) *Roberts v. Orchard*, (1863) 2 H. & C. 769, Williams, J., at p. 774.

(b) *Downing v. Capel*, (1867) L. R. 2 C. P. 461; see, too, *Chamberlain v. King*, (1871) L. R. 6 C. P. 474. *Read v. Coker*, *supra*, in so far as it is inconsistent with these cases, would seem to be overruled.

(c) *Weller v. Toke*, (1808) 9 East, 364; *Theobald v. Crichmore*, (1818) 1 B. & Ald. 227; *Hazeldine v. Grove*, (1842) 3 Q. B. 997; *Smith v. Hopper*, (1847) 9 Q. B. 1005; *Selmes v. Judge*, (1871) L. R. 6 Q. B. 724.

(d) (1845) 1 C. B. 18.

whether this decision is not in effect overruled by the latter cases (a).

It can rarely, if ever, happen that a member of the general public can be entitled to notice of action on the ground that in seeking to exercise a statutory power he went wrong through a mistake of law. He is certainly not protected by reason of entertaining a "vague opinion" that his illegal act is one in which the law will bear him out.

Mistake as to possession of office.

If a defendant is sued for an act done in the mistaken belief that he possesses the authority of an office or position not in fact belonging to him, his right to notice of action will depend upon the precise words of the statute in question. If those words give a right to notice to a certain class of persons only, a defendant cannot bring himself within their protection, simply by supposing whether through error of law or fact he belongs to that class (b); but if all persons acting in pursuance of the statute are entitled to notice, the expression is sufficiently wide to include the case of a defendant innocently usurping an authority or jurisdiction which he does not in truth possess. Accordingly a person acting as a magistrate without being duly appointed was held not entitled to notice of action under a statute, providing that without notice no writ should be served "on any justice of the peace for anything by him done in the execution of his office" (c). But where the defendants were sued for a trespass which they justified as done in the exercise of their powers as surveyors of highways, and it appeared that they had *bonâ fide* acted in that capacity although their appointment was informal, it was held that they came within the protection of a section entitling to notice "any person" sued "for anything done in pursuance of or under the authority of this Act" (d).

In *Lidster v. Borrow* (e), the plaintiff supposed himself to be a

(a) See, especially, *Smith v. Hopper*, *supra*, and *Selmes v. Judge*, *supra*, at p. 123.

(b) *Per Parke, B., Hughes v. Buckland*, (1846) 15 M. & W. p. 356.

(c) *Jones v. Williams*, (1825) 3 B. & C. 762.

(d) *Huggins v. Waydey*, (1846) 15 M. & W. 357; see, too, *Horn v. Thornborough*, (1849) 3 Ex. 846. In the case

of *Lea v. Facey*, (1886) 17 Q. B. D. 139; (1887) 19 Q. B. D. 452, it was held that a defendant who had acted as member of a local board without qualification could not be sued for penalties without notice. An older decision to the contrary effect (*Charlesworth v. Rudgard*, (1835) 1 C. M. & R. 896) was not quoted.

(e) (1839) 9 A. & E. 654.

gamekeeper under 1 & 2 Will. IV. c. 82, but in fact had never been duly authorised. It was held that he was not entitled to notice of action under a section which gave it in case of any action "against any person for anything done in pursuance of this Act." This case therefore must be taken to be overruled, as being inconsistent with the law as laid down in the later authorities. The Metropolitan Building Act (18 & 19 Vict. c. 122, s. 108), gave a right of notice of action to any district surveyor or other person for anything done or intended to be done under the provisions of the Act. It has been held that this provision did not cover every case where a person thought he was carrying out the Act, but that it only included persons *ejusdem generis* as district surveyors, that is to say, the workmen, servants and others who acted under their orders. A defendant to be entitled to notice had to bring himself within this class and prove that he was in fact under the directions of the surveyor, not merely that he thought himself so to be (a). It has, however, been held (with a view to saving expense where the contributories were very numerous) that valid notice of a winding up order, in a form prescribed by the Court, might be served either by circular or by advertisement in the public press upon the members of an unregistered friendly society (b).

No notice can be required unless when the act in question either is or is supposed to be one of the things which a statute directly authorises or orders. In *Whatman v. Pearson* (c), the defendant, a contractor, was constructing a sewer under the provisions of the Metropolitan Management Acts, and in so doing employed a number of carts and horses. One of the workmen injured the plaintiff by his negligent driving. It was held that no notice of action need be given, inasmuch as the driving was not a thing done under the powers of the Act, but merely collateral to the exercise of those powers.

Wrongful act collateral to execution of statutory power.

In the case of *Edwards v. Vestry of St. Mary, Islington* (d), a contractor supplied horses and drivers for the carts employed by the defendants in watering the streets. The plaintiff was one of

(a) *Williams v. Golding*, (1865) L. R. 1 C. P. 69; *Doust v. Slater*, (1869) 38 L. J. Q. B. 159; *Chambers v. Reid*, (1866) 13 L. T. N. S. 703.

(b) *Lead Company's Workmen's Fund Society, In re*, (1904) 2 Ch. 196.

(c) (1868) L. R. 3 C. P. 422.

(d) (1889) 22 Q. B. D. 338.

the drivers and sustained damage through the breaking down of one of the carts, which was in an unsafe condition by reason of the negligence of the defendants. It was held that the employment of carts was a thing "done or intended to be done under the powers of the vestry," and that they had a right to notice of action, their negligence having been not in a matter collateral but in one of the very things which it was their duty to provide for.

In *Smith v. Shaw* (a), the defendant was the public officer of a dock company, who under their Act appointed a dock-master with powers to superintend and direct the mooring and unmooring of vessels. By his negligent performance of this duty the plaintiff's vessel was injured. It was held that the dock-master had been acting in pursuance of the statute. But where a railway company were empowered to make a line with liberty to permit the use of it by others or to use it themselves as carriers, it was held that their right to notice for things done or omitted to be done in pursuance of the Act, or in the execution of the powers or authorities given by it, was confined to their acts and omissions as owners of the line and not as carriers (b).

Spoken words do not amount to an act or thing done. Notice of action, therefore, is never necessary in an action of slander (c).

Wrongful
omissions.

Under the expression things done in pursuance of a statute are included wrongs of omission as well as of commission. In *Davis v. Curling* (d), a surveyor of highways was held entitled to notice of action when sued for negligence in not removing certain heaps of gravel by the roadside for the deposit of which he was not responsible. It was held that he had in effect been guilty of a positive act in continuing an obstruction. So if an act not unlawful in itself has been done, the omission to take

(a) (1829) 10 B. & C. 277. In this case the question was as to limitation and not as to notice of action.

(b) *Carpue v. The London & Brighton R. Co.*, (1844) 5 Q. B. 747. But in an action for extorting unfair rates a railway company are entitled to notice (*Kent v. Great Western R. Co.*, (1846)

3 C. B. 714; but see *Garton v. Great Western R. Co.*, (1859) 28 L. J. Q. B. 321; commenting on *Kent v. Great Western R. Co.*, *supra*.

(c) *Royal Aquarium & Summer & Winter Garden Society v. Parkinson*, (1892) 1 Q. B. 431.

(d) (1845) 8 Q. B. 286.

proper precautions against injurious consequences resulting does not afford a good cause of action without notice (a). The case of *Wilson v. Mayor of Halifax* (b) goes still further. This was clearly a case of non-feasance. The defendants had omitted to erect a fence which by statute they were ordered to do, and it was held that notice must be given.

The provisions as to the form of the notice vary considerably in different statutes. For example, the Highway Act (c) simply directed that notice must be given in writing. The Larceny, Malicious Injury to Property, and Coinage Acts (d) required the "cause of action" to be stated. By 11 & 12 Vict. c. 44, s. 9, it had to be "clearly and explicitly" stated, by the Public Health Act "clearly" stated (e). In some cases the name and address of the party and his solicitor must be given, in others it is particularly required that such name and address should be indorsed. Sometimes, again, the Court in which the action is to be brought must be mentioned.

Form of
notice.

The main requisite is that the party to whom the notice is addressed should be given to understand with reasonable certainty what are the facts relied on against him, in order that he may decide whether he will tender amends or not. It is by no means necessary that the alleged cause of action should be described with technical accuracy, or with great amplitude of detail (f). Thus in *Smith v. West Derby Local Board* (g), the cause of action was for improperly filling up a trench made in the highway. The notice of action was for leaving the highway in an insufficient state of repair. It was objected that the notice of action was for a mere non-feasance, the cause of action for a misfeasance. It was held, however, that the notice was sufficient. In *Jones v. Bird* (h), the notice alleged that the defendant had altered certain

Wrongful act
should be
described
with
substantial
accuracy.

(a) *Poulson v. Thirst*, (1867) L. R. 2 C. P. 449; *Jolliffe v. Wallasey Local Board*, (1873) L. R. 9 C. P. 62; *Newton v. Ellis*, (1855) 5 E. & B. 115.

(b) (1868) L. R. 3 Ex. 114. See, too, *Holland v. Northwich Highway Board*, (1876) 34 L. T. N. S. 137.

(c) 5 & 6 Will. IV. c. 50, s. 109.

(d) 24 & 25 Vict. c. 96, s. 113; 24 & 25 Vict. c. 97, s. 71; 24 & 25 Vict. c. 99,

s. 33.

(e) 38 & 39 Vict. c. 55, s. 264.

(f) However, a mere general allegation of a breach of the law will not do. Sufficient facts must be disclosed to constitute a cause of action. See *Towsey v. White*, (1826) 5 B. & C. 125; *Freeman v. Line*, (1778) 2 Chit. 673.

(g) (1878) 3 C. P. D. 423.

(h) (1822) 5 B. & Ald. 837.

sewers in so negligent a manner that the plaintiff's house fell down. The defendant in fact while doing the work had neglected to shore up a chimney-stack adjoining the plaintiff's premises, which consequently fell down and caused the damage alleged. It was held that the notice need not specify the immediate cause of the injury.

In *Taylor v. Nesfield* (a), the defendant was a magistrate and the alleged cause of action against him was a malicious abuse of jurisdiction. The notice, however, was for a trespass and false imprisonment, and it was held that this pointed only to an act done without jurisdiction and that it did not clearly and explicitly state the cause of action, but on the contrary was likely to mislead the defendant as to the real charge which he had to meet. In *Aked v. Stocks* (b), the defendants were sued for a trespass committed by them in issuing an illegal warrant. The notice mentioned a certain person as having been entrusted with the warrant to whom it was not in fact directed, and was held insufficient on that ground. It may be doubted whether in the present day such an error in mere matter of surplusage and not likely to mislead would be considered fatal.

Time and
place.

The time and place of the alleged cause of action should be stated with such accuracy as the circumstances admit of, but the plaintiff is not to be held to an impossibility, and may be relieved from giving particulars which he does not know (c). Cases may be conceived in which he could not state the place. An inaccuracy which cannot possibly mislead does not vitiate a notice (d).

Formal
requirements.

In a like manner the Courts in dealing with the mere technical requirements of notices have avoided a strict interpretation. Where a name and address have to be given, a mistake or imperfection which do not in fact mislead will not be fatal (e).

(a) (1854) 3 E. & B. 724.

(b) (1828) 4 Bing. 509.

(c) *Martins v. Upcher*, (1842) 3 Q. B. 662; *Breeze v. Jerdein*, (1843) 4 Q. B. 585; *Jones v. Nicholls*, (1844) 13 M. & W. 361; *Jacklin v. Fytche*, (1845) 14 M. & W. 381, *Prickett v. Gratrex*,

(1846) 8 Q. B. 20; *Leary v. Patrick*, (1850) 15 Q. B. 266.

(d) *Madden v. Kensington Vestry*, (1892) 1 Q. B. 614.

(e) *James v. Swift*, (1825) 4 B. & C. 681; *Osborn v. Gough*, (1803) 3 B. & P. 551.

The "abode" of a solicitor may be either his private residence or his place of business (a). It has been held, however, that where a notice simply purported to be dated at a certain place, it could not be taken that the date necessarily gave the abode of the person sending the notice (b). It has been held in Ireland (c) that if the enactment in question requires an indorsement of a name or address, the notice is not sufficient if they appear on the face of it, the Court declining to follow an English *nisi prius* decision to the contrary (d).

The notice must be a notice of action. A mere claim for compensation will not suffice (e). It must be unconditional. A notice that proceedings will be taken unless certain terms are complied with is bad (f).

Claim for compensation.

Notice should be unconditional.

In all cases a month's notice is to be given (g) and the period is to be reckoned excluding both the day on which the notice is served and the day on which the writ is sued out. Thus, if notice be given on the first of a month, the action cannot be commenced until the second of the following month, for the party to whom the notice is given ought to have the full space of time allowed for tendering amends (h).

Time of notice how reckoned.

Under the Workmen's Compensation Acts, 1897 and 1900, it is provided by section 2 of the Act of 1897, that the notice (which should be in writing) (i) "shall give the name and address of the person injured, and shall state in ordinary

Notices under Workmen's Compensation Acts.

(a) *Roberts v. Williams*, (1835) 2 C. M. & R. 561.

(b) *Taylor v. Fenwick*, (1782) 3 B. & P. 553, n. See, too, *Williams v. Burgess*, (1810) 3 Taunt. 127.

(c) *Collins v. Hungerford*, (1857) 7 Ir. C. L. R. 581.

(d) *Crooke v. Curry*, (1789) Tidd's Practice, 9th ed., Vol. 1, p. 30.

(e) *Mason v. Birkenhead Commissioners*, (1861) 29 L. J. Ex. 407.

(f) *Norris v. Smith*, (1839) 10 A. & E. 188. For other points as to notice, see *Morgan v. Leach*, (1842) 10 M. & W. 558 (notice signed by party and indorsed by attorney); *De Gondouin v. Lewis*, (1839) 10 A. & E. 117 (notice given by next friend); *Eltob v. Wright*, (1851) 3 C. &

K. 31 (notice of action in wrong court); *Bax v. Jones*, (1817) 5 Price, 168; *Jones v. Simpson*, (1830) 1 C. & J. 174 (several notice against joint wrongdoer); *Hider v. Dorell*, (1808) 1 Taunt. 383 (notice to person acting in two capacities); *Pilkington v. Riley*, (1849) 3 Ex. 739 (notice in the name of two persons, one of whom deceased); *Lamont v. Southall*, (1839) 5 M. & W. 416 (double cause of action, one requiring notice the other not); *Lovelace v. Curry*, (1798) 7 T. R. 631 (notice of writ of process).

(g) 5 & 6 Vict. c. 97, s. 4.

(h) *Young v. Higgon*, (1840) 6 M. & W. 49.

(i) *Keen v. Milwall Dock Co.*, (1882) 8 Q. B. D. 482, C. A.

language the cause of the injury and the date at which it was sustained, and shall be served upon the employers, or if there is more than one employer, upon one of such employers" (a).

(a) Notice of accident must be given as soon as practicable, and before the injured workman voluntarily leaves the employment in which he sustained the accident.

Canadian Notes to Chapter V.

BELIEF THAT OFFICER ACTING WITHIN POWERS (a).

Ontario.

The same principle has been followed in some Canadian cases as in the English cases, namely, that the *bonâ fide* belief by the officer that he was acting within his duty entitles him to notice (b). It may be left to the jury to say whether the officer acted under a fair and reasonable supposition that he was performing a public duty (c). The protection of the statute does not seem to apply where the action is for a non-feasance (d), nor where the defendant was acting for his own benefit (e); although in one case a person arresting another in the act of stealing his property was held entitled to notice (f).

On the whole the cases are conflicting, and proceed according as the Court or jury assumes or finds a *bonâ fide* belief of duty or an act done maliciously and without probable cause. It does seem strange that the necessity or non-necessity for fulfilling a condition precedent to the suit should depend on the plaintiff's proving his case (g).

CONTENTS OF NOTICE.

Ontario.

The notice required by R. S. O. 1897, c. 88, s. 14, must be for one month (h), and be delivered personally or left for him at his usual place of abode (i) by the person intending to sue, or his

(a) P. 121, *supra*.

(b) *Scott v. Reburn*, 25 O. R. 450, constable; *Kennedy v. Burness*, 15 U. C. R. 487; *Hughes v. Pake*, 25 U. C. R. 95, arbitrators.

(c) *Cottrell v. Hueston*, 7 U. C. C. P. 277; *Carswell v. Huffman*, 1 U. C. R. 381.

(d) *Harrison v. Bryce*, 30 U. C. R. 324; *Harold v. Corporation of Simcoe*, 16 U. C. C. P. 43.

(e) *Pall v. Kenney*, 11 U. C. R. 350.

(f) *McDonald v. Cameron*, 2 U. C. R.

406.

(g) See further, article "Notice of Action," by Mr. H. M. Mowat, K.C., in 19 C. L. T. 161; also article in 21 C. L. J. 366.

(h) See p. 129, *supra*; also *Haight v. Ballard*, 2 U. C. R. 29; *McIntosh v. Vanstienburgh*, 8 U. C. R. 248; *Dempsey v. Dougherty*, 7 U. C. R. 313.

(i) Proof of service: *Byrnes v. Weld*, 7 U. C. R. 104; *Gardner v. Burwell*, Tay. 54.

solicitor or agent(*a*); stating the cause of action (*b*) and the Court (*c*), and indorsed with the name of the person (*d*) intending to sue and his abode (*e*), and indorsed with the name and abode or place of business of the solicitor or agent (if notice served by same) (*f*).

TIME AND PLACE (*g*).

PLEADING OBJECTIONS TO NOTICE.

By s. 15 the defendant may plead not guilty by statute. The objection must be taken at trial (*h*), not afterwards. Notice may be waived (*i*).

C. S. N. B. 1903, c. 65, s. 9, differs from the Ontario statute in that name and place of abode of the attorney apparently must be indorsed thereon.

"It is laid down by numerous authorities that in such cases

(*a*) See *Kemble v. McGarry*, 6 O. S. 570, signature by attorney; *McKenzie v. Macburn*, 6 O. S. 486, action brought by different attorney.

(*b*) See p. 127, *supra*. Cause of action: By s. 1 the act complained of must be done maliciously and without reasonable or probable cause. The notice ought to allege this: *Howell v. Armour*, 7 O. R. 363. Minor mistakes or variances will not affect: *Higson v. Ward*, 8 U. C. R. 502. See *Gillespie v. Wright*, 14 U. C. R. 52, and *Upper v. McFarland*, 5 U. C. R. 101, for allegation of conversion. Trespass: see *Connolly v. Adams*, 11 U. C. R. 327; *McGuinness v. Dafue*, 27 O. R. 117; 23 A. R. 704. Allegations too wide: *Spring v. Aude*, 23 U. C. C. P. 152. The proof must be confined to matters stated in notice: *Obernier v. Robertson*, 14 P. R. 553; but it is not necessary to prove all the allegations: *Byrnes v. Wild*, 7 U. C. R. 104.

(*c*) Court: see *Armstrong v. Bowes*, 16 U. C. C. P. 539; *Buck v. Hunter*, 20 U. C. R. 436; *Bross v. Huber*, 18 U. C. R. 282; *Nevill v. Township of Ross*, 22 U. C. C. P. 487; *Crum v. Foley*, 6 P. R. 164; *Wadsworth v. Mewburn*, 6 O. S. 432.

(*d*) The defendant need not be described: *Haacke v. Adamson*, 14 U. C. C. P. 201.

(*e*) Where plaintiff's name was signed,

and the name of his attorney indorsed, held insufficient: *Moran v. Palmer*, 13 U. C. C. P. 528; not followed in *Jones v. Grace*, 17 O. R. at p. 688 (1889).

(*f*) See p. 129, *supra*. Where name and residence of attorney not indorsed, but added inside at foot of notice, held sufficient: *Bross v. Huber*, 15 U. C. R. 625. Residence of attorney: see *Bates v. Walsh*, 6 U. C. R. 498; *Gillespie v. Wright*, 14 U. C. R. 52; *Armstrong v. Bowes*, 16 U. C. C. P. 539.

(*g*) P. 128, *supra*. See *Friel v. Ferguson*, 15 U. C. C. P. 584; *Oliphant v. Leslie*, 24 U. C. R. 398; *Parkyn v. Staples*, 19 U. C. C. P. 240; *Spring v. Aude*, 23 U. C. C. P. 152; *Kemble v. McGarry*, 6 O. S. 570; *Moore v. Gidley*, 32 U. C. R. 233; *Langford v. Kirkpatrick*, 2 A. R. 513; *Bond v. Conmee*, 15 O. R. 716; 16 A. R. 398; *Madden v. Shewer*, 2 U. C. R. 115; *Connolly v. Adams*, 11 U. C. R. 327; *Alderich v. Humphrey and Young*, 29 O. R. 427; *Cronkhite v. Sommerville*, 3 U. C. R. 129.

(*h*) *Armstrong v. Bowes*, 12 U. C. C. P. 539; *Moran v. Palmer*, 13 U. C. C. P. 528. See also *Verratt v. McAulay*, 5 O. R. 313; *McKay v. Cummings*, 6 O. R. 400; *Davis v. Moore*, 4 U. C. R. 209.

(*i*) *Donaldson v. Haley*, 13 U. C. C. P. 87.

Ontario.

New Brunswick.

New Brunswick.

the protection afforded by the notices of action is only for those who honestly believe in the existence of a state of facts which, if it existed, would justify the act complained of. And this is always a question for the jury, unless there is no evidence to submit to them of anything upon which any such belief could be based" (a). The reasonableness of the belief is not material (b).

Nova Scotia.

The notice to be given under R. S. N. B. 1900, c. 40, s. 12, is similar to that under the Ontario statute, except that the names and abodes may be entered upon the notice, not necessarily indorsed "upon the back thereof."

Where the plaintiff's notice set out the "maliciously and without reasonable and probable cause," but the statement of claim was drawn on the theory that the justice had jurisdiction, the plaintiff was held down to the exact terms of his notice. In the notice he alleged that the warrant was issued without authority. But the warrant was properly issued, the real question being whether it could be enforced after the debt was paid, and this was not covered by the notice (c).

WHO ENTITLED TO NOTICE.

Ontario.

Under the circumstances of the particular cases the following classes of public officers have been held entitled to notice:—

Arbitrator (d).

Constable (e).

County Crown Attorney (f).

Division Court Bailiff (g).

Justice of Peace (h).

Licence Commissioner (i).

(a) *White v. Hamm*, 36 N. B. R. 237 (1903).

(b) *Ibid.*

(c) *Hennessey v. Farquhar*, 35 N. S. R. 22 (1902). This case admirably illustrates the ingenious technicality to which this statute gives play. See further *Mott v. Milne*, 31 N. S. R. 372 (1898).

(d) *Kennedy v. Burness*, 15 U. C. R. 487; *Hughes v. Pake*, 25 U. C. R. 95.

(e) *Scott v. Reburn*, 25 O. R. 450; *Sage v. Duffy*, 11 U. C. R. 30, special constable; *Alderich v. Humphrey*, 29 O. R. 427, warrant lacking indorsation.

(f) *McDougall v. Peterson*, 40 U. C. R. 95.

(g) *Lough v. Coleman*, 29 U. C. R. 367, where bailiff indemnified; *Sander-son v. Coleman*, 4 U. C. R. 119; *McCance*

v. Bateman, 12 U. C. C. P. 469; *Dale v. Cool*, 4 U. C. C. P. 460; *Pearson v. Ruttan*, 15 U. C. C. P. 79, bailiff and sureties; *Anderson v. Grace*, unsealed warrant. See also *Stephens v. Stapleton*, 40 U. C. R. 353; *McMartin v. Hurlburt*, 2 A. R. 146; *Pardee v. Glass*, 11 O. R. 275; *Hanns v. Johnston*, 3 O. R. 100.

(h) *Haacke v. Adamson*, 14 U. C. C. P. 201; *Bross v. Huber*, 18 U. C. R. 283, no jurisdiction; *Sinden v. Brown*, 17 A. R. 173; *McGuinness v. Daffoe*, 27 O. R. 117; 23 A. R. 704; *Friel v. Ferguson*, 15 U. C. C. P. 584, invalid warrant; *Carswell v. Huffman*, 1 U. C. R. 381, when jury find that J.P. acting as such; *Marsh v. Boulton*, 4 U. C. R. 354.

(i) *Leeson v. Licence Commissioners of Dufferin*, 19 O. R. 67.

Mayor (a).
 Pathmaster (b).
 Poundkeeper (c).
 Revenue Officer (d).
 School Trustee (e).
 Sheriff (f).
 Tax Collector (g).

The Sheriff (h).

Constable (i).

Constable (k).

Ontario.

British
Columbia.

New
Brunswick.

Nova
Scotia.

WHO ARE NOT ENTITLED TO NOTICE.

The following (under the circumstances) have been held not entitled to notice :—

Constable (l).
 Division Court Bailiff (m).
 Division Court Clerk (n).
 Execution Creditor (o).
 Justice of the Peace (p).

(a) *Moran v. Palmer*, 13 U. C. C. P. 328.

(b) *Helliwell v. Taylor*, 16 U. C. R. 279. But see *Stalker v. Township of Dumich*, 15 O. R. 342; *McDonald v. Dickinson*, 25 O. R. 45; 21 A. R. 485, where pathmaster acting in capacity of day labourer.

(c) *Denison v. Cunningham*, 35 U. C. R. 383; *Davis v. Williams*, 13 U. C. C. P. 365.

(d) *Wadsworth v. Murphy*, 2 U. C. R. 120.

(e) *Spry v. Numby*, 11 U. C. C. P. 285.

(f) See 62 Vict. c. 7 (Ont.), s. 3.

(g) *Howard v. Herrington*, 20 A. R. 175.

(h) *Johnson v. Harris*, 1 B. C. R. 93 (1878).

(i) *White v. Hamm*, 36 N. B. R. 237 (1903).

(k) *Peppy v. Grono*, 10 N. S. R. (1 R. & C.) 31.

(l) *Kelly v. Barton*, *Kelly v. Archibald*, 26 O. R. 608; 22 A. R. 522, act not imposed in discharge of duty. See, further, *Ibbotson v. Henry*, 8 O. R. 625; *Hovell v. Armour*, 7 O. R. 363; *McKay*

v. Cummings, 6 O. R. 400; *Beloh v. Arnott*, 9 U. C. C. P. 68.

(m) *Dale v. Cool*, 6 U. C. C. P. 544, action for excess of money levied on execution; *Stewart v. Cowan*, 40 U. C. R. 346. See R. S. O. 1897, c. 60, ss. 293-300.

(n) *McLeish v. Howard*, 3 A. R. 503, money received under judgment.

(o) *Dollery v. Whaley*, 12 U. C. C. P. 105; *Timon v. Stubbs*, 1 U. C. R. 347; *Fwoke v. Robertson*, 6 O. S. 572.

(p) Issuing warrant without information: *Friel v. Ferguson*, 15 U. C. C. P. 584. Where jury find that J.P. did not *bonâ fide* believe he was acting within duty: *Cummins v. Moore*, 37 U. C. R. 130; *Cusick v. McRae*, 11 U. C. R. 509; *Neill v. McMillan*, 25 U. C. R. 485; *Allen v. McQuarrie*, 44 U. C. R. 62. Not returning conviction: *Grant v. McFadden*, 11 U. C. C. P. 122; *Ranney v. Jones*, 21 U. C. R. 370. Acting without qualification: *Crabb v. Longworth*, 4 U. C. C. P. 283. Allowing default judgment: *Mills v. Conger*, 4 O. S. 383.

Ontario.

Municipal Corporation (a).
 Municipal Councillors (b).
 Official Assignee (c).
 Post Office Inspector (d).
 Registrar of Deeds (e).
 Returning Officer (f).
 Sheriff (g).
 Surveyor of Streets (h).

Alberta and
Saskatche-
wan.

The Sheriff (i).

Nova
Scotia.

Inland Revenue Officer (k).

NOTICE UNDER WORKMEN'S COMPENSATION ACTS (l).

The formal requirements of notice under the Workmen's Compensation for Injuries Acts are less stringent than under the Acts protecting public officers (m). There is more stringency in the mode of objecting to the notice (n).

WORKMEN'S COMPENSATION ACT: WHEN NOTICE
DISPENSED WITH.

Ontario.

Notice of injury may be dispensed with under ss. 9, 13, and 14 of the Act where there is reasonable excuse for the want of it. What constitutes reasonable excuse must depend on the

(a) *Hodgins v. United Counties of Huron and Bruce*, 3 E. & A. 169; *McCarthy v. Township of Vespra*, 16 P. R. 416; *City of St. John v. Christie*, 21 S. C. R. 1; *Scottish Ontario and Manitoba Land Co. v. City of Toronto*, 24 A. R. 208.

(b) Defrauding corporation: *Town of Chatham v. Houston*, 27 U. C. R. 550.

(c) *Archibald v. Haldan*, 30 U. C. R. 30.

(d) *Hanes v. Burnham*, 23 A. R. 90; 26 O. R. 528.

(e) *Harrison v. Brega*, 20 U. C. R. 324, negligent omission in certificate; *Ross v. McLay*, 40 U. C. R. 83, where the subject of the suit is to recover excessive fees the Registrar is entitled to notice; cf. *Ontario Industrial Loan and Investment Co. v. Lindsey*; *County of Bruce v. McLay*, 11 A. R. 477.

(f) *Walton v. Apjohn*, 5 O. R. 65.

(g) *McWhirter v. Corbett*, 4 U. C. C. P. 203, execution of a *fi. fa.*; but see 62 Vict. c. 7 (Ont.), s. 3.

(h) *McFarlane v. McDougall*, 3 O. S. 73.

(i) *Macdonnell v. Robertson*, 1 Terr. L. R. 438, 1 Man. L. R. 434 (1893), executing *fi. fa.*, following *McWhirter v. Corbett*, 4 U. C. C. P. 203. See C. O. N. W. T. 1898, c. 21, s. 536.

(k) Sued by informer for his share in proceeds: *Wright v. Curless*, 21 N. S. R. 232; *Carroll v. Curless*, 23 N. S. R. 32 (1890); *McDonald v. Clarke*, 22 N. S. R. 10.

(l) P. 129, *supra*.

(m) See *Cox v. Hamilton Sewer Pipe Co.*, 14 O. R. 300, case of solicitor's letter, *Stone v. Hyde*, 9 Q. B. D. 76, followed; *Mason v. Bertram*, 18 O. R. 1, signature not required.

(n) *Cavanagh v. Park*, 23 A. R. 715.

circumstances of the case. The notoriety of an accident and the knowledge of the employers that the injury had resulted in death, and that a claim had been made by deceased's representative, was considered sufficient (a). **Ontario.**

NOTICE UNDER MUNICIPAL ACT.

Under the Consolidated Municipal Act (3 Edw. VII. c. 19), **Ontario.** s. 606 (3), notice of accident has to be given (b).

Where the plaintiff gave notice to the municipality of the accident as having happened on May 7th, when it actually happened May 6th, but describing the circumstances and also that he had sought the aid of a neighbour whom he named, held sufficient within s. 606, sub-s. 3, of the Municipal Act (c).

The state of disrepair into which a street has fallen may be so patent that notice to the corporation of the defect will be assumed (d); but not where the appearance of the defect is inconspicuous (e).

REASONABLE EXCUSE FOR WANT OF NOTICE.

What constitutes reasonable excuse is not defined, and must depend very much upon actual knowledge, or verbal notice may be an element of the excuse, but the accident must be accompanied by some disabling circumstance other than mere ignorance of the law (f).

(a) *Armstrong v. Canada Atlantic R. W. Co.* (1902), 4 O. L. R. 560.

(b) See *McQuillan v. Town of St. Mary's*, 31 O. R. 401, defective sidewalk; cf. *City of St. John v. Christie*, 21 S. C. R. 1. See also cases in Denton on Municipal Negligence.

(c) *McInnes v. Township of Egremont* (1903), 5 O. L. R. 713.

(d) *McGarr v. Town of Prescott* (1902), 4 O. L. R. 280.

(e) *McNiroy v. Town of Bracebridge* (1905), 10 O. L. R. 360.

(f) *O'Connor v. City of Hamilton* (1905), 10 O. L. R. 529; *Armstrong v. Canada Atlantic R. W. Co.* (1902), 4 O. L. R. 560, referred to.

CHAPTER VI.

DAMAGE.

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In general proof of damage essential to cause of action.

As a general rule an action of tort will not lie unless the plaintiff has suffered some damage sufficiently substantial to be worthy the attention of the Courts, the maxim being “*De minimis non curat lex.*” There are, however, certain exceptional cases in which an action will lie although no damage has been suffered.

Exceptions :—
Trespass.

Of such exceptional classes of cases the most important is that of trespass, whether to the person, land, or goods. That an action should be allowed for an invasion of the person, however slight, may well be explained on the ground of the necessity of preventing breaches of the peace ; to refuse it might tempt the injured party to take the law into his own hands. And, similarly, in the cases of trespass to lands and goods the rule that the cause of action is independent of damage (a) has been said to rest on the doctrine of the inviolability of the person. “These rights of action are given in respect of the immediate and present violation of the possession of the plaintiff independently of his rights of property; they are an extension of that protection which the law throws around the person” (b). Consequently a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to substantial damages, although he may have incurred no pecuniary loss thereby (c).

Certain classes of nuisance.

Again, in certain cases of nuisance an action lies without the necessity of proving any actual damage to the plaintiff. For instance, a commoner may sue another commoner for surcharging, or a stranger for wrongfully putting beasts on the common,

(a) *Bideford Urban Council v. Bideford Ry.*, (1904) 68 J. P. 123. *Spence*, (1844) 13 M. & W. p. 581.
 (b) *Per* Lord Denman, *Rogers v.* (c) *The Mediana*, (1899) P. 127, at p. 136 ; affirmed, (1900) A. C. 113.

though he have suffered no injury either by reason of his having no beasts of his own to put there (a), or by reason of a sufficiency of common being left (b). And *à fortiori* a right of action accrues to the commoners when an overt act of the lord of the manor detracts from their enjoyment thus: where the lord of the manor or his assignees so works minerals under the common as to cause a subsidence of the surface (c) an injunction will be granted; and where by manorial custom commoners are entitled to draw sand or stone from out the common land, the lord of the manor will be restrained from enclosing the common and thus derogating from the rights of the commoners (d). An interference with the water rights of a riparian proprietor is actionable none the less because the plaintiff has never had occasion to use the water (e). So where the inhabitants of a district had a right of pot-water, and the owner of the soil from which the water came at various times diminished the supply so that there was not sufficient at such times for the general need of the inhabitants, an inhabitant was held entitled to sue, although there had never been an insufficiency at any time when he had occasion to use the water (f). So, in the case of an action for disturbing an easement of light or a right of way, proof of damage to the plaintiff is not necessary. The owner of ancient lights which are obstructed may sue, although the house was unoccupied at the time of the obstruction. If a private right of way be obstructed by the locking of a gate across the way the reversioner of the tenement to which the way is appurtenant may sue, although at such time the obstruction could be no damage to him (g). The reason usually assigned for allowing a right of action in all these cases is that the doing of the acts complained of would, if continued, bar the plaintiff's legal right by establishing evidence in future in favour of the wrong-doer (h). This reason is open to the objection that it

(a) *Wells v. Watling*, (1778) 2 W. Bl. 1233.

(b) See notes to *Mellor v. Spateman*, (1669) 1 Wms. Saund. 346 a.

(c) *Bishop Auckland Co-operative Society v. Butterknowle Colliery Co.*, (1904) 2 Ch. 419.

(d) *Heath v. Deane*, (1905) 2 Ch. 86.

(e) *Sampson v. Hoddinott*, (1857) 1 C. B. N. S. 590.

(f) *Harrop v. Hirst*, (1868) L. R. 4 Ex. 43.

(g) *Kidgill v. Moor*, (1850) 9 C. B. 364.

(h) *Per Martin, B., Harrop v. Hirst*, L. R. 4 Ex. p. 45; and (1669) 1 Wms. Saund. 346 a.

theoretically involves a *petitio principii*, for it is only where the party whose right is invaded has the means of resisting the invasion that the continuance of the injurious act affords any evidence against him, on the principle "*Qui non prohibet quod prohibere potest assentire videtur*," and in many cases the only mode of resistance open to him is that of action; but, at the same time, it must be conceded that there would frequently be great difficulty, after the nuisance had continued for a long time, in showing that the plaintiff until recently had suffered no damage, and therefore was not in a position to resist.

But, although in the above-mentioned cases of nuisance there need be no actual present damage to the plaintiff to vest a right of action, still there must be damage in a certain sense,—the injury inflicted must be appreciable, so that the plaintiff's capability of enjoying his rights if he wished to enjoy them would be substantially less. A mere inappreciable diminution in the volume of a stream flowing through the plaintiff's land (a), or in the quantity of the light coming to his ancient windows (b), or an inappreciable disturbance of his surface by the withdrawal of the support of the adjoining soil (c), is not usually a ground of action. Although whenever an injury is done *to a right*, actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of the right, and the law will presume damage (d).

In cases of nuisances, however, which are productive of mere personal discomfort, such as noisy or unsavoury trades, in order

(a) *Kensit v. Great Eastern R. Co.*, (1884) 27 Ch. D. 122.

(b) *Kelk v. Pearson*, (1871) L. R. 6 Ch. 809. As to the quantum of obstruction, to ancient lights, which will entitle a plaintiff to a mandatory injunction, see *Colls v. Home and Colonial Stores, Ltd.*, (1904) 20 T. L. R. 475, H. L. As to when the remedy is in damages, see *Kine v. Jolly*, (1905) 1 Ch. 480, C. A.

(c) In *Smith v. Thackerah*, (1866) L. R. 1 C. P. 564, the Court said that withdrawal of support was not actionable unless followed by appreciable damage, but probably all that they meant was that the *subsidence* must

be appreciable. See *per* Collins, J., in *Attorney-General v. Conduit Colliery Co.*, (1895) 1 Q. B. p. 313. Still in considering whether in a particular case the subsidence is appreciable, some reference must presumably be had to the amount of damage which the plaintiff is likely to suffer from it. And that will to some extent depend upon the locality. A subsidence of a couple of inches in the middle of a valuable cricket ground might be very appreciable, while a subsidence of a foot in the middle of a moor might not.

(d) *Embrey v. Owen*, (1851) 6 Ex. 353.

to give the plaintiff a cause of action not only must the nuisance have been of such a degree as to afford a capability of substantial annoyance, but the plaintiff must have actually suffered that annoyance. Thus where a confectioner had for more than twenty years used a pestle and mortar in his back premises, which abutted on the garden of a physician, but the noise and vibration did not cause any substantial annoyance until shortly before action brought, when the physician erected a consulting-room at the end of his garden, it was held that until such erection of the consulting-room the latter could have brought no action, and therefore until such date the statute did not begin to run against him (a). Apparently, in cases of nuisance of this character, the rule of law is, that so long as each of the parties uses his own property for the ordinary purposes for which it was constructed, then so long there is nothing that can be regarded, in law, as an actionable nuisance. But if either party use his property in such an unusual manner as to cause injury to his neighbour, the aggrieved person is entitled to protection (b).

Again, in certain cases of breaches of duty by public officers, an action has been held to lie for the mere breach without proof of damage. Thus, where under the old law a debtor was taken in execution of a judgment, a mere temporary escape for however short a time was, without more, cause of action against the sheriff (c); so, too, in the case of the sheriff delaying to execute a *ca. sa.*, the creditor might sue, though he had suffered no loss by the delay (d). So, too, an action lies without damage against a returning officer at a parliamentary election for wrongfully refusing to receive the plaintiff's vote (e).

Certain
classes of
breach of
duty by
public
officers.

The cases of libel, and those kinds of slander which are actionable, *per se*, can hardly be regarded as forming an exception to the general rule that to ground an action the plaintiff must have suffered damage, for it is impossible to exactly estimate the effect of published defamation, and some degree of damage to the

Libel and
actionable
slander.

(a) *Sturges v. Bridgman*, (1879) 11 Ch. D. 852.

(b) *Sanders - Clark v. Grosvenor Mansions Co.*, (1900) 2 Ch. 373; *Knight v. Isle of Wight Electric Light and Power Co.*, (1904) 73 L. J. Ch. 299; 90 L. T. 410.

(c) *Per Parke, B., Williams v. Mostyn*, (1838) 4 M. & W. p. 153.

(d) *Clifton v. Hooper*, (1844) 6 Q. B. 468.

(e) *Ashby v. White*, (1703) Lord Raym 938.

Infringement
of trade-mark.

plaintiff's character may very reasonably be presumed. And the same observation may be made with reference to the invasion of a trade-mark, which is actionable without proof of any specific injury (a), for though the plaintiff may be unable to prove any actual deprivation of custom, yet such deprivation may fairly be presumed. Where, however, substantial damages are claimed the onus of proving loss rests upon the plaintiff (b).

Trover.

An action of trover will technically lie notwithstanding that the chattel converted be redelivered before action brought (c), unless, indeed, the redelivery be accepted as an accord and satisfaction; but this may, perhaps, be explained on the ground that the cause of action at the date of the conversion was for substantial damage, and a right of action once vested cannot be got rid of by the mere act of the defendant.

In *Ashby v. White* (d) Holt, C.J., put forward as an explanation generally applicable to all cases in which an action lies without proof of damage, that "want of right and want of remedy are reciprocal," and that every "injury imports a damage when a man is thereby hindered of his right." This as an explanation, however, seems to be illusory, for it merely transfers the difficulty back one step from the remedy to the right, leaving unsolved the question why in certain classes of rights the right is to have the defendant refrain from doing the act complained of at all, and in others is merely a right not to be damaged. In truth it seems that in many of the cases in which an action is allowed without proof of damage its allowance is dependent not upon any principle, but upon a purely arbitrary rule.

Compensation
the principle
of redress.

In actions of tort, compensation is the principle of redress, and the measure of damages is, in the absence of matters of aggravation, the exact amount of the injury which the plaintiff has suffered in his person, property, or reputation; including in cases of personal injury the loss of prospective earnings (e).

And in such cases the assessment of damages is for the jury, consequently, where there is a payment into court, with an

(a) *Blotfield v. Payne*, (1833) 4 B. & Ad. 410.

(b) *The Magnolia Metal Co. v. The Atlas Metal Co.*, (1897) 14 R. P. C. 389.

(c) Bull. N. P. 46; Rolle, Abr. Trespass, P. 6.

(d) (1703) Lord Raym. 938.

(e) *Johnston v. Great Western R. Co.*, (1904) 2 K. B. 250, C. A.

admission of liability, the amount so paid in should not be divulged during the course of the proceedings (a).

But when the tort is accompanied by a malicious intent on the part of the defendant, the jury are allowed to take such malice into consideration in assessing the damages, and to award the plaintiff a sum more than sufficient to compensate him for any injury received by him of the kinds above mentioned. Thus where in an enquiry as to damages, in a case of seduction, the jury awarded the plaintiff 1,000*l.*, the Court refused to set aside the award, although the parties were only in a moderate sphere of life (b).

Damages for matters of aggravation.

Again, where the defendant insisted on joining the plaintiff's shooting party, and fired at his birds, at the same time using intemperate and insulting language, the jury having awarded 500*l.* damages, the Court refused to disturb the verdict (c), Heath, J., giving as a reason for such a refusal that to allow juries to give substantial damages for insult in such cases "goes to prevent the practice of duelling" (d). So where the defendant entered the plaintiff's premises and strewed poisoned barley there, whereby some of the plaintiff's fowls died, the jury were directed that they might give substantial damages beyond the loss of the fowls (e). And in one case the plaintiff in an action for breaking and entering his house was allowed to give in evidence that his wife was so terrified by the defendant's conduct that she fell ill and died in consequence, for the purpose of showing that the entry was outrageous and violent, a fact which the jury were entitled to consider in assessing the damages (f); although in order for illness to enhance damages it must be shown that the malady was the natural or immediate result of the tortious act (g). In *Cock v. Wortham* (h), where the plaintiff in an action for trespass

(a) *Jaques v. South Essex Water Works Co.*, (1904) 20 T. L. R. 563.

(b) *Elliott v. Nicklin*, (1818) 5 Price, 641.

(c) *Merest v. Harrey*, (1814) 5 Taunt. 442.

(d) *Ibid.* p. 444.

(e) *Sears v. Lyons*, (1818) 2 Stark. 317.

(f) *Huxley v. Berg*, (1815) 1 Stark. 98.

(g) *Allsopp v. Allsopp*, (1860) 29 L. J. Ex. 315.

C.T.

(h) (1736) 2 Selw. N. P. 10th ed. 1104.

Where the act of debauching was committed in the father's house by a person whose presence there was a trespass, the father had his election whether he would sue in trespass *quare clausum fregit* and give the debauching in evidence as matter of aggravation or under the head of *alia enormia*, or on the case *per quod servitium amisit*. See *per Holt, C.J., Russell v. Corn*, (1703) 6

to a house claimed damages for debauching his daughter and no loss of service was proved, it was said "as to loss of service not having been proved, that was quite immaterial, the rule being that where loss of service is the gist of the action there it must be proved; but where laid only in aggravation of damages, loss of service need not be proved."

Similarly in an American case, where the defendant remained on the portion of the highway opposite the plaintiff's house for the purpose of using slanderous language of the plaintiff, the soil of that portion of the highway being the property of the plaintiff, it was held that the defendant might be sued in trespass, and that in such action the plaintiff might recover damages for the slander as matter of aggravation (*a*). So when the defendant in pulling down his house caused portions of the timber to fall upon the adjoining premises of the plaintiff, where they did damage, it was held that if the jury thought the defendant had maliciously and intentionally caused the timber to fall where it did they might give higher damages than if the injury was the result of mere negligence (*b*). It seems to have been at one time thought that the propriety of giving extra damages for matter of aggravation was confined to cases of trespass, but this has been decided otherwise. In *Bell v. Midland R. Co.* (*c*), where the reversioner of a private railway siding sued the defendants for maliciously placing an obstruction between the siding and their railway to which he had a right of access, the jury were held entitled to give damages in excess of the pecuniary injury to the reversion. In one case (*d*), indeed, Lord Esher and Lopes, L.J., said that if

Mod. p. 127, and *per* Buller, J., *Bennett v. Allcott*, (1878) 2 T. R. p. 167. And that is presumably still the law. See below, p. 226.

(*a*) *Adams v. Rivers*, (1851) 11 Barb. (N.Y.) 290. The plaintiff there sued in trespass to avoid the difficulty of proving special damage, the words used not having been actionable *per se*.

(*b*) *Emblen v. Myers*, (1861) 6 H. & N. 54.

(*c*) (1861) 10 C. B. N. S. 287. Where malice is of the gist of the action, the greater the malice the higher are the damages that will be allowed (*Pearson*

v. Lemaitre, (1843) 5 M. & G. 700).

(*d*) *Dixon v. Calcraft*, (1892) 1 Q. B. pp. 464, 466. In the later case of *Smith v. Enright*, (1893) 69 L. T. N. S. 724, where an action of replevin was brought for goods distrained for rent which was found not to be due, it was held by a Divisional Court, upon the authority of *Brewer v. Dew*, (1843) 11 M. & W. 625, that the plaintiff might recover damages for injury to his reputation in trade caused by the illegal seizure. It is not there stated whether the defendant knew the rent not to be due. If he did, the decision may be

goods be illegally seized under such circumstances as to cast an imputation upon the character of the owner, he cannot in an action for such illegal seizure recover any damages for the injury to his reputation. They, however, seem to have stated the law unnecessarily widely. They were dealing with a seizure which, though illegal, was not malicious. If goods be seized maliciously with an intent thereby to defame, it seems clear on the authority of the above cases that damages for injury to the reputation may be recovered as a matter of aggravation.

These extra damages are generally spoken of as exemplary, as though the object of allowing them were punitive, and to deter others in like cases offending (a). But it is doubtful whether the better view is not that they are consolatory rather than penal, resting upon the principle that where there is malice, the plaintiff suffers from a sense of wrong and is entitled to a *solatium* for that mental pain (b). And this latter view seems to be more in accord with the modern practice, according to which in actions of tort evidence of the defendant's means is disallowed, on the ground that it is nothing to the purpose "that damages are taken from a deep pocket" (c).

Aggravated damages are consolatory, not punitive.

It is not every damage that is a damage in the eye of the law. There may be an actionable wrong and damage flowing from that wrong as its natural consequence, and yet no compensation may be recoverable in respect of such damage. Legal damage must be something which is capable of being estimated in terms of money; it must be a temporal and material loss. Thus, expulsion from a religious society is not legal damage (d). Loss of the hospitality of friends in the sense of gratuitous

What is legal damage.

justified, for in *Brewer v. Dew* the Court proceeded upon the ground that the seizure was made "under a false and pretended claim of right," and that the act was consequently malicious. If, however, he did not, the case is in direct conflict with the decision of the Court of Appeal in *Dixon v. Calcraft*, and consequently cannot be supported.

(a) See *per* Wilmot, C.J., *Tullidge v. Wade*, (1769) 3 Wils. p. 19; *per* Heath, J., *Merest v. Harrey*, (1814) 5 Taunt. p. 444; *Mayne on Damages*, 5th ed. p. 46.

(b) This view has been adopted in

America to the extent of allowing aggravated damages against a master for the malice of his servant (*Hawes v. Knowles*, (1874) 114 Mass. 518. And see *Sedgwick on Damages*, 7th ed., Vol. 1, p. 217, n.).

(c) *Per* Alderson, B., *Short v. Stoy*, (1836) Roscoe, N. P. 17th ed. pp. 64, 87; *James v. Biddington*, (1834) 6 C. & P. 589; *Hodsoll v. Taylor*, (1873) L. R. 9 Q. B. 79; *Keyse v. Keyse and Maxwell*, (1886) 11 P. D. 100.

(d) *Roberts v. Roberts*, (1864) 5 B. & S. 384.

supply by them of food and drink is sufficiently material for this purpose (a), but loss of the mere society of friends as distinguished from their hospitality is not (b). It is, however, actionable *per se* without proof of either damage or loss of society to say that the plaintiff is affected by a contagious or infectious disease (c).

The extra costs and expenses which are incurred by the successful party in an action in excess of what he recovers on taxation against the other party are not regarded as legal damage, and cannot be recovered in any form of action (d). This probably rests upon the ground that the incurring of such extra costs is the voluntary act of the party himself.

In one case (e) Lord Esher said that "where a plaintiff has a cause of action for a wrongful act of the defendant, the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act and so probably a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act" (f), even including damage which was not an infringement of any legal right. In that case the owners of a building with ancient windows pulled it down and rebuilt it so that the windows coincided only in part with the old windows. Lord Esher was of opinion that in an action for damages for obstruction of the lights in the new building the owners would be entitled to recover damages for the obstruction of the non-coinciding portion of the windows as well as of the coinciding portion. But that opinion was expressed *obiter*, and seems to be unsupported by other authority.

Remoteness
of damage.

Liability in tort is in general confined to the damage which is the proximate result of the tortious act, and does not extend to

(a) *Davies v. Solomon*, (1871) L. R. 7 Q. B. 112.

(b) *Per Lord Wensleydale, Lynch v. Knight*, (1861) 9 H. L. C. p. 599.

(c) *Bloodworth v. Gray*, (1844) 7 Man. & Gr. 334.

(d) *Sinclair v. Eldred*, (1811) 4 Taunt. 7; *Jenkins v. Biddulph*, (1827) 4 Bing. 160; *Doe v. Davis*, (1795) 1 Esp. 358; *Grace v. Morgan*, (1836) 2 Bing. N. C.

534. But see *contra, Sandback v. Thomas*, (1816) 1 Stark. 306, and *Bradlaugh v. Newdegate*, (1883) 11 Q. B. D. 1.

(e) *Re London, Tilbury & Southend R. Co. and Trustees of Gower's Walk Schools*, (1889) 24 Q. B. D. 326.

(f) *Ibid.* p. 329. For rule of law as to ancient lights, see *Colls v. Home & Colonial Stores, Ltd.*, (1904) 20 T. L. R. 475, H. L.

damage which is only remotely connected with it (a). "One who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person" (b).

In *Smith v. London & South Western R. Co.* (c) the defendants permitted some trimmings of one of the hedges bordering their railway to remain in heaps between the hedge and the line for a fortnight in very hot weather. Sparks from a passing engine caused the heaps to ignite. The fire caught the hedge and, owing to a high wind which was blowing at the time, spread across a stubble field and over a road, and burnt a cottage of the plaintiff, which was distant two hundred yards from the spot where the fire began. It was held that the damage to the plaintiff was not too remote. In *Powell v. Salisbury* (d), the defendant, being under an obligation to repair a fence, neglected to do so, whereby the plaintiff's cattle escaped into the defendant's close, and were there killed by the falling of a haystack. The defendant was held liable. In that case, however, although there was no averment or evidence upon the point, it must probably be assumed that the defendant knew, or had the means of knowing, that the haystack was in a condition in which it was likely to fall. In *Sneesby v. Lancashire & Yorkshire R. Co.* (e), some cattle of the plaintiff were being driven along a road which crossed a siding of the defendants' railway on the level. The defendants negligently caused some trucks to be sent down on to the siding while the cattle were crossing it, and the cattle being frightened rushed away. Some of them were afterwards found

(a) As to the application of this rule in the case of undue detention, through the negligence of the carrier's agent, in the course of transit, see *Searle v. Lund*, (1904) 90 L. T. 529, C. A.

(b) *Per Bovill, C.J., Sharp v. Powell*, (1872) L. R. 7 C. P. at p. 258.

(c) (1870) L. R. 6 C. P. 14.

(d) (1828) 2 Y. & J. 391.

(e) (1875) 1 Q. B. D. 42. See, too, *Halstrap v. Gregory*, (1895) 1 Q. B. 561; but see *Luscombe v. G. W. Ry.*, (1899) 2 Q. B. 313, which distinguishes between "passing" and "straying" cattle.

at a distance of a quarter of a mile dead upon the defendants' railway, having escaped, through defects in fences for which the defendants were not responsible, into a garden, and thence on to the line, where they were run over by a passing train. The damage was held to be not too remote. Again, in *Sullivan v. Creed* (a), the damage was held not too remote, when the defendant left a loaded gun at full cock, beside a gap from which a private path led over defendant's lands from the public road to his house. The defendant's son (aged 15), coming towards his father's house along the path, found the gun, and returning with it to the public road, not knowing it was loaded, pointed it in play at the plaintiff who was injured by the gun going off. But on the other hand, in *Sharp v. Powell* (b), the defendant's servant, in breach of a Police Act, washed the defendant's van in the public street. The water used in the operation ran down the gutter, and would, under ordinary circumstances, have flowed down a grating into the sewer; but owing to a severe frost the grating had, unknown to the defendant or his servant, become stopped up with ice, whereby the water used in washing the van was unable to get away, and spread over the road and there froze. The plaintiff's horse, while being led past the spot, slipped upon the ice and was damaged. The injury was held to be too remote. In *Hoey v. Felton* (c), the plaintiff was engaged as a journeyman at a cigar factory, and in the ordinary course of his duties ought to have presented himself at the factory at two o'clock. At half-past one he was wrongfully given into custody by the defendant upon a false charge, and detained for half an hour. By reason of such imprisonment he became so unwell that upon being liberated he was obliged to go home instead of going to his work at the factory; in consequence whereof his employer filled up his place with another workman and he lost his employment. In an action for false imprisonment it was held that the loss of employment was too remote to be the subject of a claim for damages.

(a) (1904) 2 Ir. R. 317, C. A.

(c) (1861) 11 C. B. N. S. 142. See

(b) (1872) L. R. 7 C. P. 253. Cp. *Hardacre v. Idle District Council*, (1896) 1 Q. B. 335, as to which case see above, p. 109.

also *Hobbs v. L. & S. W. Ry.*, (1875) L. R. 10 Q. B., Cockburn, J., pp. 117, 118.

The above decisions show that no general rule can be laid down by reference to which the question, whether in any particular case the damage sought to be recovered is too remote, can be determined. Whether it is or is not too remote is a question of fact depending on all the circumstances of the case, but although a question of fact it is one for the Court to determine.

Whether injury to health resulting from fear caused by wrongful conduct of the defendant can be the subject of a claim for damages was at one time doubted. It has now, however, been decided that compensation is recoverable for physical injury, although unaccompanied by actual impact (a).

Nervous shock
caused by
fright.

A similar decision was arrived at in *Bell v. Great Northern R. Co. of Ireland* (b), in which it was held that if the defendants' negligence causes, as its natural and reasonable consequence, a great fright which produces nervous shock, and if, as the natural and reasonable consequence of that shock, the plaintiff's health is injured, damages can be recovered for such injury. These decisions, though logically satisfactory, are not in accord with the ruling of the Privy Council in the earlier case of *The Victorian Railway Commissioners v. Coultas* (c), the material facts in which were as follows: The defendants' servant, in charge of a gate at a place where a road crossed the defendants' line on the level, negligently invited the plaintiff and his wife, who were driving in a vehicle, to cross the line at a time when, owing to the approach of a train, it was dangerous to do so. Just as they had passed over one set of rails the train dashed by. The train did not touch either the plaintiffs or their vehicle, but the fright produced by their dangerous position caused such a severe nervous shock to the female plaintiff that she had a miscarriage (d). The Judicial Committee of the Privy Council held that the damage was too remote. This decision, which is not binding in Great Britain, cannot, however, in view of more recent decisions, be regarded as expressing the present state of the law upon the subject.

(a) *Dulieu v. White*, (1901) 2 K. B. 669. See also *Wilkinson v. Downton*, (1897) 2 Q. B. 57.

(b) (1890) 26 L. R. 1r. 428.

(c) (1887) 13 App. Cas. 222.

(d) See 12 Victorian Law Rep. 895.

Want of
proximate-
ness supplied
by intention.

But even where the damage is such as a person possessed of all the defendant's knowledge of the surrounding circumstances could not have reasonably anticipated as likely to flow from the wrongful act, the defendant will nevertheless be liable if he intended the result which in fact happened. Intention will supply the necessary link to make that consequence proximate which was *primâ facie* remote. Thus, where the plaintiff was under contract with the owner of land adjoining a high road to execute certain work thereon, and the defendants, a water company, wrongfully permitted their main, which ran along and under the road, to leak, whereby the plaintiff was delayed in the execution of his contract, it was held that the plaintiff had no cause of action, for that the damage was too remote (a), but the Court at the same time expressly intimated that if the defendants had intended the result the action would have lain (b). Actual intention is not, however, in all cases a necessary concomitant of liability (c). And this intention will be presumed when the concurrent circumstances raise a reasonable assumption that the ultimate consequences of the initial negligence were or ought to have been within the contemplation of the tort-feasor (d).

Intervening
wrongful act
of third
party.

Where between the act of the defendant and the damage

(a) *Cattle v. Stockton Waterworks Co.*, (1875) L. R. 10 Q. B. 453.

(b) *Ibid.*, p. 458. See, however, *Chamberlain v. Boyd*, (1883) 11 Q. B. D. 407. There a statement of claim alleged that, the plaintiff having been blackballed for a club, a proposal was made to alter the rules regulating the election of members to the club, and that the defendant with a view to retain the existing regulations and to secure the exclusion of the plaintiff from membership, published defamatory matter of him, and thereby induced the majority of the members to retain the existing regulations, and so prevented the plaintiff from again seeking to be elected. On demurrer the claim was held bad; one of the grounds of the decision being, that even if the deprivation of an opportunity of candidature was a sufficient legal damage it was too remote,

notwithstanding that it was the very result that the defendant intended. But the Court need not be understood to have decided anything which would conflict with the proposition stated in the text; apparently all that they meant was that it was so irrational to suppose that there was any logical connection between the defamation and the retention of the regulations, that the averment of that connection might be disregarded and treated as if it were struck out of the claim; see the judgment of Lord Coleridge at p. 412.

(c) *Gibbings v. Hungerford*, (1904) 1 Ir. R. 211, C. A.

(d) *McDowall v. Great Western R. Co.*, (1902) 86 L. T. 558; reversed by C. A. (1908) 2 K. B. 331. It is, however, submitted that the above stated proposition may still be regarded, at least, as arguable.

complained of there intervenes, as one of the links in the chain of causes, the wrongful act or omission of a third party, the question whether the damage is to be regarded as too remotely connected with the defendant's wrong-doing seems to depend upon the following considerations:—

(a) As stated above, intention will supply the want of proximate-ness; if, therefore, the defendant intends that, as the consequence of the act done by himself, the third party shall do the act which immediately causes the damage, he will be liable. Thus if a printseller exhibit prints or effigies in his window, and thereby attract a crowd to look at them which causes the footway to be obstructed, he will be responsible for the obstruction (a), for the very object of putting such things in the windows is that passers-by should stop and look at them. So the erection of a playhouse may be a nuisance by reason of its drawing crowds of people to its doors, and for such nuisance the owners of the house will be responsible (b), for they intend the crowds to come there. Again, though it is not the natural consequence of the uttering of a slander that it should be repeated by third persons, yet if the original utterer intended that it should be repeated he will be liable for the consequences of such repetition (c).

(b) If the defendant's act is wrongful, and is likely to afford an opportunity to the third party to do the act immediately producing the damage, such third party acting negligently and without intention, the defendant will be liable (d). Thus where the defendant wrongfully left a cellar-flap in a street reared against the wall of the house, and a third party negligently caused the flap to fall on the plaintiff, the defendant was held answerable (e). So, too, where the defendant unlawfully placed across a roadway a *cheval de frise* to prevent vehicles from using

Where act of third party done negligently.

(a) *Rees v. Carlile*, (1834) 6 C. P. 636.

317, C. A.

(b) *Bidderton's Case*, (1695) Holt, 538. The case of *Barber v. Penley*, (1893) 2 Ch. 447, may be rested on this ground.

(c) *Per Lopes, L.J., Speight v. Gosnay*, (1891) 60 L. J. Q. B. p. 232, and *per Bowen, I.J., Ratcliffe v. Evans*, (1892) 2 Q. B. p. 530.

(d) *Sullivan v. Creed*, (1904) 2 Ir. R.

(e) *Abbott v. Macfie*, (1863) 2 H. & C. 744. For the application of the same principle to a duty arising out of contract, see *Burrows v. March Gas & Coke Co.*, (1872) L. R. 7 Ex. 96; *Mowbray v. Merryweather*, (1895) 2 Q. B. 640; *Engelhart v. Farrant*, (1897) 1 Q. B. 240, C. A.

the road, and some person, without the defendant's authority, subsequently removed it from the roadway on to the footpath adjoining and negligently left it there, and the plaintiff, who was lawfully using the footpath, ran against the spikes of the *cheval de frise* in the dark and was injured, the damage was held not too remote (a).

And the same rule applies where the intervening negligence of the third party consists not in a positive act done, but in an omission. Thus where the defendants wrongfully caused water to spout up in a public road, and the plaintiff's horses, which were passing with his carriage along the road, took fright at the water and swerved to the other side of the road, where some third persons who were constructing a sewer had carelessly left a cutting unfenced, and the horses fell into the cutting and were damaged, the plaintiff was held entitled to recover against the defendants, notwithstanding that without the negligence of the third persons the injury would probably not have happened (b).

Where, however, a person of mature age with full apprehension of the probable danger chooses, for purposes of recreation, to encounter the risk and is injured, his voluntary and unnecessary exposure of his person to the risk of mischance may avoid his right of action (c).

Where act of
third party
done
wilfully.

(c) If the third party, in doing the act which immediately produces the damage, acts not negligently but wilfully, then, even though the defendant's own act was wrongful and the act of the third party was the natural consequence of it, the defendant, if he did not intend that consequence, will not be liable, unless he induced a belief in the third party's mind that he would be justified in doing the injurious act. Thus if the defendant publishes of the plaintiff slanderous matter not actionable *per se*, and the special damage relied on is a wrongful act of a third party done in consequence of such slander, the test of the defendant's liability is whether the third party would, upon the assumption that the slanderous matter was true, be justified in doing the act

(a) *Clark v. Chambers*, (1878) 3 Q. B. D. 327. See, too, *Collins v. Middle Level Commissioners*, (1869) L. R. 4 C. P. 279, and *Scott v. Shepherd*, (1772) 2 W. Bl. 892.

(b) *Hill v. New River Co.*, (1868) 9 B. & S. 303; and see *Sullivan v. Creed*, *supra*, p. 144.

(c) *Giles v. London County Council*, (1904) 68 J. P. 10.

which is laid as special damage (a). Therefore, where the defendant said of the plaintiff, a married woman, that she had nearly been seduced before marriage, whereupon her husband in consequence of the slander turned her out of doors, it was held that the expulsion was not sufficient special damage to support an action, for the husband would have had no legal justification in expelling her even if the imputation had been true, though it would have been otherwise if the slander had imputed adultery to the plaintiff (b). If, in consequence of a slanderous imputation, third persons afterwards assemble and maltreat the slandered party by way of punishment for his supposed transgression, the slanderer cannot without more be held responsible (c); though cases might readily be put in which the circumstances would afford very strong evidence of an intention on the part of the speaker that such a result should follow. But even then it seems that, in order to render the speaker liable in such a case, it is necessary that the jury should find the existence of such intention as a fact (d). In the case of *Lynch v. Knight* (e) Lord Wensleydale inclined to the view that a person guilty of a wrongful act such as slander must be held responsible for all such consequences as, "taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow," but the majority of the law lords, Campbell, Brougham, and Cranworth, seem to have decided that case in direct opposition to such a doctrine (f).

In one case, where the defendant having left his horse and cart standing unattended in the street, the horse backed the cart into the plaintiff's window, and it was set up as a defence that the cause of the horse's moving was that a passer-by wantonly whipped

(a) *Vicars v. Wilcox*, (1806) 8 East, 1, as explained by Lord Campbell in *Lynch v. Knight*, (1861) 9 H. L. C. at p. 590.

(b) *Lynch v. Knight*, (1861) 9 H. L. C. 577.

(c) *Per* Lord Ellenborough, *Vicars v. Wilcox*, (1806) 8 East, p. 4.

(d) *Heapy, T., In re*, (1888) 22 L. R. Ir. 500.

(e) (1861) 9 H. L. C. p. 600.

(f) It should be observed, however, that the case of *Lynch v. Knight* has sometimes been treated as though there were no discrepancy between the opinions of the different law lords. See *per* Brett, L.J., *Chamberlain v. Boyd*, (1883) 11 Q. B. D. p. 414, and *per* Huddleston, B., *Whitney v. Moignard*, (1890) 24 Q. B. D. p. 631.

the horse, and that consequently the person so whipping the horse and not the defendant was the party liable, Tindal, C.J., at *nisi prius*, said that "if a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done" (a); but this was only an *obiter dictum*, the jury having interposed and stated that they did not believe that the horse had been struck at all.

It has, however, been held in a recent case that where a runaway horse and carriage runs down a person in broad daylight, in a public street, the *prima facie* presumption is that the owner of the horse and carriage is in fault (b).

The mere fact that one person by his wrongful act affords an opportunity to another to commit a wholly independent wrong, cannot render the former liable for the consequences of the latter's wrong-doing. Where, however, the original cause of the ultimate disaster, is the negligent or tortious act of one person, and the "effective" cause of the accident is the negligence of another, between whom and the original wrong-doer there is some relation; or, in other words, where there is the interposition of the negligence of another person, between the primary negligence and the ultimate accident the mediate negligence of the original tortfeasor, which afforded opportunity for the immediate negligence of the second wrong-doer, renders him liable for the injury resulting from such negligence (c).

Thus although the immediate vendor of tins of preserved food, or other articles of a similar kind, might not, in all cases, be responsible to his customers for their condition, it appears probable that the wholesale trader, from whom the retail vendor procured them, would be liable to a third party who sustained injury by reason of their unwholesome character, the original vendor, when supplying the goods, being aware that they were purchased from him for human consumption (d).

(a) *Illidge v. Goodwin*, (1831) 5 C. & P. p. 192.

(b) *Snee v. Durkie*, (1903) 6 F. 42, Ct. of Sess.

(c) *Engelhart v. Farrant*, (1897) 1 Q. B. 240, C. A. As to the liability of a railway company for neglecting to protect passengers from assaults by

their fellow-passengers, see *Pounder v. North Eastern R. Co.*, (1892) 1 Q. B. 385, and the observations upon that case in *Cobb v. Great Western R. Co.*, (1894) A. C. 419.

(d) *Gordon v. McHardy*, (1903) 6 F. 210, Ct. of Sess.

(d) It is, however, an obvious proposition that if the defendant's conduct is *per se* lawful, the mere fact that it is likely to induce third parties to commit some independent wrong will not render him liable therefor. Thus where certain members of the Salvation Army assembled together for the lawful purpose of peaceably marching in procession through the streets of a town, but did so with the knowledge that they would probably come into collision with certain other persons antagonistic to themselves, and with good reason to suppose that a breach of the peace would be committed by such latter persons, and in consequence breaches of the peace were in fact committed by such persons, it was nevertheless held that the members of the Salvation Army, having committed no acts of violence themselves, were not responsible for the misconduct of their opponents (a).

In the case of *Rex v. Moore* (b), where the defendant used his premises as a pigeon-shooting ground, and in consequence idle persons collected outside the grounds, with the object of shooting the pigeons which escaped, and did damage, it was indeed held that the defendant was liable, notwithstanding that the presence of such third persons was against his wish. But the ground upon which that decision went was that, as the acts of the third persons were the probable consequence of the defendant's act, and such as the experience of mankind must have led any one to expect as the result, the defendant was as answerable as if that result was his real object (c), which is the very proposition that was directly repudiated by the majority of the House of Lords in *Lynch v. Knight*. *Rex v. Moore* has, however, been followed by Page-Wood, V.-C., in *Walker v. Brewster* (d), by Romer, J., in *Bellamy v. Wells* (e), and by North, J., in *Barber v. Penley* (f), though in none of these cases was *Lynch v. Knight* referred to. It may be that the doctrine of *Rex v. Moore* is too inveterate

Doctrine of
Rex v. Moore.

(a) *Beatty v. Gillbanks*, (1882) 9 Q. B. D. 308. See, however, *O'Kelly v. Harrey*, (1882) 14 L. R. Ir. 105, where the Court of Appeal in Ireland held that a justice of the peace was justified in dispersing a lawful assembly of persons, if, owing to the probability of such persons being

attacked by others who were antagonistic to them, there was no other means of preserving the peace.

(b) (1832) 3 B. & Ad. 184.

(c) See *per* Littledale, J., S. C. p. 188.

(d) (1867) L. R. 5 Eq. 25.

(e) (1890) 63 L. T. N. S. 635.

(f) (1893) 2 Ch. 447.

- Canada.** the damages should be reduced to an amount mentioned (a). As observed in this case by Nesbitt, J., "It is very difficult under Lord Campbell's Act to get a jury to understand that they cannot give solatium for wounded feelings, &c., but that their verdict must only be for such a sum as there is reasonable proof of a reasonable expectation of a pecuniary benefit (b).
- Manitoba.** *Monkman v. Follis* (c) is a case of exemplary damages qualified by an application on affidavits to the same Court for a reduction of the verdict.

REMOTENESS OF DAMAGE (d).

- Ontario.** A review of authorities on remote and proximate causes of damage is to be found in *Toms v. Township of Whitby* (e).

- Manitoba.** Where the plaintiff hired a team and driver to the defendant for use in drawing defendant's thrashing machine and engine and, the engine having set fire to the stack, the plaintiff's driver hitched up to the "separator" to remove it, but owing to the rapidity of the fire the horses were burned, it was held that the defendant was liable for the loss of the horses (f).

- New Brunswick.** In an action for wrongfully detaining the plaintiff's timber a claim for loss by reason of the saw-mill being kept idle was held too remote (g).

- Nova Scotia.** Where the defendants negligently left unguarded an excavation, and the plaintiff's horse, being startled by the whistle of a locomotive, carried the plaintiff into the excavation, it was held that, the excavation being an illegal obstruction, the defendant was bound to anticipate horses being so startled at that point (h).

(a) *Central Vermont R. W. Co. v. Franchise*, 35 S. C. R. 68 (1904). The same principle of reduction was applied in *Canadian Pacific R. W. Co. v. Blain*, 34 S. C. R. 74 (1903); 36 S. C. R. 159 (1905); *Warrington v. Palmer*, 32 S. C. R. 126 (1902), reduction to amount allowable under Employers' Liability Acts; *Pender v. War Eagle*, 7 B. C. R. 162 (1898); *Guion v. Thibau*, 36 N. S. R. 542 (1904).

(b) *Ibid.* at p. 77; cf. *Runciman v. The Star Line Steamship Co.*, 35 N. B. R. 123 (1900).

(c) 5 Man. L. R. 317 (1888).

(d) P. 139, *supra*.

(e) 35 U. C. R. 195; 37 U. C. R. 100, case of neglect to repair railing on embankment. See also *Toronto R. W. Co. v. Grinstead*, 24 S. C. R. 570, plaintiff taking cold after expulsion from street car held not too remote; *Wallace v. Swift*, 31 U. C. R. 523; 28 U. C. R.

563, loss by fire of goods shipped; *McKelvin v. City of London*, 22 O. R. 70, injury to driver by obstruction in highway; *McMullen v. Free*, 13 O. R. 57, impurity of seed; *Stewart v. Sculthorp*, 25 O. R. 544, ditto; *Lewis v. City of Toronto*, 39 U. C. R. 343, raising level of lane; *West v. Town of Parkdale*, 15 O. R. 319, lowering highway; *O'Byrne v. Campbell*, 15 O. R. 339, neglect of duty by township engineer; *City of St. Thomas v. Credit Valley R. W. Co.*, 15 O. R. 673, abandonment of railway station; *Wood v. Bowden*, 22 U. C. R. 466.

(f) *Thorn v. James*, 14 Man. L. R. 373 (1903), following *Connell v. Prescott*, 20 A. R. 49 (1892); 22 S. C. R. 47.

(g) *Godard v. Fred Boom Co.*, 6 All. 448.

(h) *Davis v. Commercial Bank of Windsor*, 32 N. S. R. 383, *per* Graham, C.J.

Where the defendants detained a ship beyond the stipulated time, and during such detention the vessel was lost in a storm, held that the loss of the vessel was too remote a consequence of the detention (*a*). Nova Scotia.

NERVOUS SHOCK (*b*).

Apparently Upper Canadian nerves are considered to be better than those found in Great Britain, as the case of *The Victorian Railway Commissioners v. Coultas* (*c*) continues to be followed in Ontario (*d*).

The *Victorian Railway Commissioners* case was doubted and distinguished in *Kirkpatrick v. The Canadian Pacific R. W. Co.* (*e*); so that in New Brunswick nervous shock from fright resulting from an accident is ground for an action. New Brunswick.

INTENTION NOT ALWAYS MATERIAL (*f*).

In a case where the defendant's act was the immediate cause of the injury, but he did not know the plaintiff was there, it was held that trespass would lie, the defendant's intention being immaterial (*g*). Ontario.

INTERVENING ACT OF THIRD PARTY (*h*).

It will not be safe to assume that an intervening third party is the proper defendant instead of the original tort-feasor. Thus where an owner of land is threatened with damage by water used for irrigation coming from a higher level he has a right to protect himself by building a barrier without reference to any damage that might happen to his neighbour (in this case an adjoining railway). The railway should have proceeded against the upper proprietor (*i*). Canada.

ACT OF THIRD PARTY DONE WILFULLY (*k*).

The case of *Lynch v. Knight* (*l*) is somewhat similar to the Ontario case of *Lidlow v. Baston* (*m*). In this case the alleged defamatory words were that the plaintiff, who received an allowance for the maintenance of his wife's niece, had put in a fictitious account, &c.; the special damage alleged being that in consequence the niece and his wife had left him and refused to live with him. Held that such damage was not recognisable at law, not being the natural and reasonable consequence of the words used.

(*a*) *Tobin v. Symonds*, 46 N. S. R. (2 Old.) 141 (1866).

(*b*) P. 142, *supra*.

(*c*) 13 App. Cas. 222 (1887).

(*d*) *Geiger v. Grand Trunk R. W. Co.*, 100 L. R. 511 (1905), following also *Henderson v. Canada Atlantic R. W. Co.*, 25 A. R. 437 (1896), no damages for "mental shock."

(*e*) 35 N. B. R. at p. 63 (1902).

(*f*) P. 143, *supra*.

(*g*) *Anderson v. Stiver*, 26 U. C. R. 526.

(*h*) P. 143, *supra*.

(*i*) *McBryan v. Canadian Pacific R. W. Co.*, 29 S. C. R. 359 (1899), reversing 6 B. C. R. 136.

(*k*) See p. 146.

(*l*) 9 H. L. C. 577 (1861).

(*m*) 5 O. L. R. 309 (1903).

CHAPTER VII.

SELF-REDESS AND SELF-PROTECTION.

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THERE are certain classes of injuries in respect of which the party injured is not necessarily bound to resort to the Courts for his remedy, but is entitled to take the law into his own hands and redress the wrong himself. Such is the right in case of trespasses to the person or property.

Defence of
the person.

It is lawful for one man to use force towards another in the defence of his own person, but this force must not transgress the reasonable limits of the occasion. Nor does the mere assumption of an attitude of defence, by one party, without actual physical contact with his opponent, necessarily justify the other in making active reprisals (a). Where, however, an assault actually takes place the assailed person is not bound to stand on a passive defence, for it is a reasonable means of repelling an attack to attack in return. Nor does the law require that a man when labouring under a natural feeling of resentment consequent on gross provocation should very nicely measure the weight of his blows. A mere assault may justify a battery (b), but there must be some proportion between the aggression and the defence. Ordinary violence must be repelled by ordinary means, and a deadly weapon should not be used except against a deadly attack. "A man cannot justify a maim for every assault; as if A. strike B., B. cannot justify the drawing his sword and cutting off his hand; but it must be such an assault whereby probably his life may be in danger" (c).

(a) *Moriarty v. Brooks*, (1833) 6 Car. & P. 684; *contra* in case of attack, *Stephens v. Myers*, (1830) 4 Car. & P. 349.

(b) *Dale v. Wood*, 7 Moore, 33; *Titley v. Foxall*, (1758) 2 Ld. Ken. 308.

(c) *Per Cur.* *Cook v. Beal*, (1697)

A husband has the same license in defending his wife as in defending himself, and so a wife in defending her husband. It is said also that a man may justify an assault in defence of his master because protection and allegiance are due to him. So he may justify a defence of his father or mother or children under age (a). But it is also said that a master cannot so justify in defence of his servant, because the master might have an action *per quod servitium amisit* (b). The distinction and the reason given seem hardly satisfactory.

Defence of wife or husband, parent or child, master or servant.

Force again may be used in defence of property real or personal, but it can only be so used in resisting something in the nature of a trespass, and in defence of actual possession or the right of possession (c). In *Dean v. Hogg* (d), the defendant had engaged a steam-boat for the conveyance of himself and a party, but the vessel remained under the management and control of the captain. The plaintiff having come on board was ordered to withdraw by the defendant, and on refusal was forcibly expelled. It was held that the defendant had not such possession of the vessel as to justify him upon his own authority in expelling an intruder. In *Holmes v. Bagge* (e), the plaintiff and defendant were both members of a cricket club; a match was going on and the plaintiff interfered with the game, and persisted in remaining on that part of the ground reserved to the players, of whom the defendant was one. The latter had him removed forcibly, and in an action of assault justified, among other pleas, on the ground that he was defending the possession of the two elevens engaged in the game. It was held, however, that such a plea could not be supported (f).

Defence of property.

1 Lord Raym. p. 117. See *Cockroft v. Smith*, (1705) 11 Mod. 43.

(a) 3 Salk. 46. As will be seen (below, p. 200), anyone may use force in order to prevent another being assaulted. But greater latitude is allowed in self-defence and in the defence of a wife or child, than in the defence of a stranger. In the one case the defendant, according to the old form of pleadings, might allege that in resisting the plaintiff, *insultum fecit*. In the other he had to allege that in the first place *molliter manus imposuit*.

(b) *Leward v. Baseley*, (1695) 1 Lord Raym. 62.

(c) *Scott v. Brown*, (1885) 51 L. T. 746.

(d) (1834) 10 Bing. 345. See, too, *Roberts v. Tayler*, (1845) 1 C. B. 117.

(e) (1853) 1 E. & B. 782.

(f) It is suggested in the judgment (1 E. & B. p. 786) that it would have been a good plea if the defendant had alleged that he caused the plaintiff to be removed on the ground that he was disturbing persons lawfully playing a lawful game.

Actual
possession.

Actual possession without, or without proof of, title is sufficient to justify the use of reasonable force in repelling a mere wrongdoer (a).

Recaption
of chattels.

He who is entitled to the immediate possession of a chattel may commit an assault to recover it from any one who has it in his actual possession and wrongfully detains it, provided that such possession was wrongful in its inception, as, for example, if the party assaulted has taken the chattel by a trespass, or even as an innocent purchaser has acquired it by an act of conversion from some one without title (b). But it is apprehended that if a person has a chattel bailed to him, and unlawfully refuses to give it up on the termination of the bailment the owner must bring his action, and cannot use force to recover his property since the original possession was lawful (c), and the same rule would apply where the vendor of a chattel wrongfully refuses to make delivery to the purchaser.

Re-entry
on land.

He who is entitled to the immediate possession of realty may make an entry, and may, according to the better opinion (d), justify in a civil action the use of so much force as is necessary to enable him to effect the entry and to expel the intruder therefrom, provided the degree of violence used does not exceed a common assault; but a forcible entry, though justifiable in an action, renders the party committing it liable to indictment.

It is not lawful as a rule to use force in resisting a trespass to land or goods unless warning be first given. The trespasser should first be requested to desist, and if he refuses so to do, so much force only may be used as is necessary to overcome his resistance. If in resisting he commits an assault, the question

(a) *Every v. Smith*, (1857) 26 L. J. Ex. 344; *Brett v. Mullarkey*, (1873) Ir. Rep. 7 C. L. 120; *Thomas v. Marsh*, (1833) 5 C. & P. 596; *Cutteris v. Cropper*, (1812) 4 Taunt. 547.

(b) *Blades v. Higgs*, (1861) 10 C. B. N. S. 713; *Rea v. Milton*, (1827) 1 M. & M. 107. As to re-vesting of goods in owner upon conviction of thief, see 56 & 57 Vict. c. 71, s. 24.

(c) It is on this principle that the cases of entry upon land for the recaption of goods have been decided (see

note to *Webb v. Bearan* (1844) 6 M. & G. p. 1056, and it is to be presumed that as you may not go upon the land of another to recover your goods, *a fortiori*, you may not commit an assault for such a purpose. As to the circumstances under which an unauthorised entry on land may be justified for the purposes of recaption of chattels, see below, p. 345.

(d) See cases collected below, pp. 333-335, where the subject of Forcible Entry is fully dealt with.

then becomes one of defence of person as well as defence of property (a).

In case, however, of a violent trespass, the trespasser may be resisted at once with the strong hand and without any parley. "It is lawful to oppose force to force, and if one breaks down the gate or comes into my close *vi et armis*, I need not request him to be gone, but may lay my hands upon him immediately, for it is but returning violence with violence. So if one comes forcibly and takes away my goods, I may oppose him without any more ado, for there is no time to make a request" (b).

Violent
trespass.

It is not necessary in order to justify the use of force that the person against whom it is employed should have actually at the time committed a trespass. It is enough if he is endeavouring to do so, and that force is reasonably necessary to prevent him succeeding in such attempt (c).

Attempts to
trespass.

Under no circumstances is it lawful merely for the purpose of resisting a trespass to property to use violence likely to imperil life or limb, even though such violence be necessary for the purpose (d). Land or goods may be defended by assault and battery, but not by wounding. In *Collins v. Renison* (e) the plaintiff sued for an assault committed by throwing him off a ladder. It was pleaded that the plaintiff was trespassing, and had persisted in the trespass though requested to desist, and that thereupon the defendant "gently shook the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, thereby doing as little damage as possible to the plaintiff." It was held that this

Limit in use
of force in
defending
property.

(a) *Polkinhorn v. Wright*, (1845) 8 Q. B. 197; *Webster v. Watts*, (1847) 11 Q. B. 311. See *Oakes v. Wood*, (1837) 2 M. & W. 791.

(b) *Per Cur.*, *Green v. Goddard*, (1704) 2 Salk. p. 641. See *Weaver v. Bush*, (1798) 8 T. R. 78.

(c) *Polkinhorn v. Wright*, (1845) 8 Q. B. 197. See, however, *Shingleton v. Smith*, (1700) 2 Lutw. 1481; as to whether *bona fide* belief, by a servant, that the act complained of was necessary for the protection of his master's property will justify the commission of a statutory offence, see *Miles v. Hutch-*

ings, (1903) 2 K. B. 714.

(d) 2 Inst. 316. And see *Kinsella v. Hamilton*, (1890) 26 L. R. Ir. 671. The statement in the Report on the Featherstone Riots (as to which, see below, p. 202), to the effect that "the taking of life can only be justified by the necessity of protecting persons and property against various forms of violent crime, &c.," was presumably not intended to negative the proposition above stated, for property can hardly be in peril of seizure or destruction by rioters without life being imperilled at the same time.

(e) (1754) *Sayer*, 138.

plea was bad, since it disclosed a degree of violence which could not be justified for the purpose of preventing the trespass alleged (a).

Duress.

Force can only be used in direct assertion of a right of possession. It is not lawful to imprison a man for the purpose of compelling a restitution of property (b). And an assault is committed, sounding in damages against the gaoler, when a prisoner is detained by the warders after his acquittal (c).

Protection of game.

Whether a landowner can justify shooting a dog which is trespassing upon his land in pursuit of game, depends upon the question whether the game pursued is in actual peril at the time. Where to an action of trespass for shooting the plaintiff's dog, it was pleaded in justification that the dog was chasing hares in the defendant's close, and that the defendant's gamekeeper shot the dog for the preservation of the hares, the Court held the plea bad on demurrer for not alleging that it was necessary to kill the dog to save the hares (d). But where it is necessary to kill the dog to save the game it may lawfully be done, and the landowner is not to be deterred from that mode of protection by mere considerations of the relative value of the game protected and of the dog shot. "A man might shoot even a valuable greyhound which was chasing a hare if the hare was in peril" (e).

As the only practical mode of protecting crops from the ravages of pigeons is to shoot them, a man may justify shooting his neighbour's tame pigeons if found damaging the crops (f).

Distinction according as owner of property invaded is absent or present at time of invasion.

With regard to the nature of the means that may lawfully be employed for the protection of property, a distinction is to be drawn between cases in which the owner of the property is

(a) See, too, *Gregory v. Hill*, (1799) 8 T. R. 299.

(b) *Harvey v. Mayne*, (1872) Ir. Rep. 6 C. L. 417.

(c) *Mee v. Cruickshank*, (1902) 86 L. T. 708.

(d) *Vere v. Lord Cawdor*, (1809) 11 East, 568. The earlier case of *Wadhurst v. Damme*, (1604) Cro. Jac. 45, where a plea that the dog was used to kill conies in the defendant's warren, and was at the time chasing conies

there, was upheld, cannot now be regarded as law.

(e) Per Blackburn, J., *Taylor v. Newman*, (1863) 4 B. & S. p. 91; and see *Miles v. Hutchings*, (1903) 2 K. B. 714.

(f) *Taylor v. Newman*, (1863) 4 B. & S. 89; as to when criminal action will lie against a person for shooting pigeons, and as to who may institute proceedings, see *Smith v. Dear*, (1903) 88 L. T. 664.

present at the time of the injury being inflicted on the invader, and cases in which the damage is suffered by the invader in his absence. The means which are lawful in the latter class of cases are wider than those which are lawful in the former. "Is it illegal," says Dallas, J., in *Deane v. Clayton* (a), "to place spikes or glass upon a wall, and if a party climbing over be thereby wounded or cut, can he bring an action? And yet if I were to see a trespasser coming down my area, or getting over the garden wall, I could not drive the spike into his hand or cut him with the glass. The doctrine depends on a broad distinction. Presence in its very nature is more or less protection; absence is abandonment and dereliction for the time; presence may supply means and limit what it supplies; but if during absence property can only be protected by such means as may be resorted to in the case of presence, all property lying open to inroad can have no protection, at least by any act of the party himself; for to say that he can only be protected when absent by such means as he could use if present, is a contradiction in the nature of things." Therefore the owner of a wood may lawfully set dog spears in it for the protection of the game, and if a trespassing dog be killed by running against one of the spears, no action will lie at the suit of the owner of the dog, notwithstanding that no game may have been in peril at the time (b).

But under no circumstances can a person, for the purpose of protecting his property in his absence, justify the setting of a spring-gun or man-trap or other instrument intended to cause serious bodily injury to human beings. Thus in *Bird v. Holbrook* (c), where the defendant, having had flowers stolen from his garden, set in the garden for its future protection a spring-gun, and the plaintiff, a boy who was in search of a fowl which had strayed into the garden, and who had no knowledge of the existence of the gun, got over the garden wall and, coming into contact with the gun, was damaged, the defendant was held

Setting engines intended to cause serious bodily injury.

(a) (1817) 7 Taunt. p. 521.

(b) *Per* Gibbs, C.J., and Dallas, J., *Deane v. Clayton*, (1817) 7 Taunt. 489, and *Jordin v. Crump*, (1841) 8 M. & W. 782. Absence of notice to the owner of the dog is immaterial, *ibid*.

(c) (1828) 4 Bing. 528. This decision

went upon the common law, the cause of action having arisen prior to the passing of the 7 & 8 Geo. IV. c. 18, as to which see below. But the correctness of the decision has been doubted, see *Jordin v. Crump*, (1841) 8 M. & W. p. 789.

liable. In the earlier case of *Ilott v. Wilkes* (a), where the plaintiff was wounded by a spring-gun set for the protection of game in a wood where he was trespassing with knowledge that there were guns set there, the Court held that the action would not lie, but they did so entirely upon the ground that the plaintiff, having had notice of the guns and so having wilfully courted the danger, brought himself within the maxim, *volenti non fit injuria*.

The Act of 7 & 8 Geo. IV. c. 18 (b), which prohibited the setting of spring-guns, man-traps, and other engines calculated to destroy human life with intent to inflict grievous bodily harm, was merely declaratory of the common law (c), except in so far as it made the mere act of setting such an engine with the above intent a misdemeanour whether without notice or not. Though the statute makes it a criminal offence to set the prohibited engines even with notice, still a trespasser who, having notice, is injured by such an engine, will not be entitled to an action, for the maxim *volenti non fit injuria* will apply notwithstanding the statute (d). Whether it is lawful to set a spring-gun or man-trap in a dwelling-house at night to protect it against burglars is doubtful, but perhaps it is so on the principle suggested by *Dallas, J.* (e), that a man may resort to wider means for his protection when he is absent or asleep than when he is awake and on the spot. The above statute contains a proviso that nothing in the Act shall be deemed to make it a misdemeanour to set from sunset to sunrise any spring-gun, man-trap, or other engine which shall be set in a dwelling-house for the protection thereof. Though the proviso does not expressly legalise the setting of such an engine under such circumstances, it suggests that it is lawful.

(a) (1820) 3 B. & Ald. 304.

(b) Re-enacted by 24 & 25 Vict. c. 100, s. 31.

(c) *Per Best, C.J.*, (1828) 4 Bing. p. 642.

(d) As to a recent application of this maxim, see *Giles v. London County Council*, (1904) 68 J. P. 10. It has, indeed, been laid down that where a person, in breach of a statutory, as opposed to a common law duty, creates

a source of danger, into contact with which another person comes and is damaged, the mere fact that the latter had notice of the danger will not necessarily make his running of the risk voluntary within the meaning of the maxim (see below, Ch. XV.); but it is apprehended that this doctrine does not apply where the party running the risk is a trespasser.

(e) See above, p. 155.

But every man has a right to keep even a fierce dog for the protection of his property against trespassers (a), for though a dog if savage is likely to injure a trespasser to some extent, it is not likely to do very serious damage. Watch-dogs.

Analogous to the cases of self-protection above dealt with are those in which an act causing damage to an innocent person is sought to be justified on the ground that it was necessary for the protection of the doer of it, against either the forces of nature or the wrongful act of a third party; but the justification in these latter cases is restricted within much narrower limits. Protection of property against incursions of the sea, or inland floods.

An owner of land, situate on the sea coast, is entitled to protect his land from the incursions of the sea by building a groin or sea wall, and if the effect of his so doing is to cause the sea to flow with greater violence against the land of the adjoining owners and do damage he will not be responsible (b). But the converse of this proposition is not allowable, an owner of foreshore not being entitled to remove a deposit of beach, or other natural safeguard against incursions of the sea, if such removal imperil the adjacent country (c). Even in the case of inland water a landowner may, however, lawfully erect a barrier to protect his land from inundation by an extraordinary flood, that is to say, if he anticipates that the flood-water, rising to an unprecedented height, will seek a new course in the direction of his land, over which the ordinary flood-water has not been accustomed to flow (d). Nor is a landowner responsible to an adjoining owner for the results of the wrongful act of a third party over whom he has no control, although the mediate, as opposed to the immediate, cause of the damage may arise out of some act of the first landowner (e). But he cannot interfere with the course of ordinary flood-water; and, therefore, if a river in times of ordinary flood has been used to overflow its

(a) *Per Tindal, C.J., Sarch v. Blackburn*, (1830) 4 C. & P. p. 300; and *per Lord Kenyon, Brook v. Copeland*, (1794) 1 Esp. p. 203.

(b) *Rees v. Commissioners for Pagham*, (1828) 8 B. & C. 355.

(c) *Crossman v. Bristol & South Wales Union R.*, (1863) 11 W. R. 981.

(d) *Neild v. London & North Western R. Co.*, (1874) L. R. 10 Ex. 4; and *per Lord Eldon, Menzies v. Breadalbane*, (1828) 3 Bligh, N. S., p. 418.

(e) *Ely Brewery Co. v. Pontypridd Urban District Council*, (1904) 68 J. P. 3, C. A.

banks and find an outlet over the lands of the adjoining owner, such owner cannot, for the protection of his lands, lawfully raise the bank of the river if the effect will be to throw the flood-water against the lands of the proprietors on the other side (a). And even where the flood is extraordinary, if the water has already invaded the land and collected on it, the owner may not, in order to protect himself against the consequences of the water remaining there, dig a cut for the purpose of getting rid of the water, if by so doing he will cause damage to the parties on whose land he discharges it (b), for "there is a difference between protecting yourself from an injury which is not yet suffered by you and getting rid of the consequences of an injury which has occurred to you" (c). And this principle probably applies equally to the case of a wrongful deposit upon a man's premises by a third party of something calculated to do damage, in which case it is apprehended that the owner of the premises could not justify removing the noxious thing to the damage of his innocent neighbour, at all events, if the act of removal was deliberate. In *Scott v. Shepherd* (d), Gould, J., suggested that if a squib was thrown into a coach full of company, the person throwing it out again would not be answerable for the consequences; but probably what he meant was, the suddenness of the thing and the terror inspired by it would leave no time for reflection, and so would deprive the act of ejection of that voluntary character which is essential to liability (e). And where the injury to one proprietor, though immediately proceeding from natural causes beyond human control, has been immediately caused by the lawful acts of a neighbouring proprietor, it is very doubtful if the injured party has a remedy (f).

Abatement of
nuisances.

Another class of injuries in respect of which the party injured is entitled to take the law into his own hands, and provide his own remedy, is that of nuisances.

As a general rule, every one who is damaged by a private

(a) *Menzies v. Breadalbane*, (1828) 3 Bligh, N. S., 414; *Rex v. Trafford*, (1831) 1 B. & Ad. 874; 8 Bing. 204.

(b) *Whalley v. Lancashire & Yorkshire R. Co.*, (1884) 13 Q. B. D. 131.

(c) *Per* Lindley, L.J., *ibid.* p. 140.

(d) (1772) 2 W. Bl. 892.

(e) See above, p. 8.

(f) *Smith v. Musgrave*, (1877) 2 App. Cas. 781; *Ely Brewery Co. v. Pontypriidd Urban District Council*, (1904) 68 J. P. 3, C. A.

nuisance is entitled to abate it. A man may enter upon his neighbour's land, and abate a nuisance of filth which his neighbour has placed there (a), provided he suffers special damage thereby, and is not injured merely as a member of the public (b). One may justify breaking down a gate which obstructs a private right of way, or cutting off those portions of one's neighbour's trees which project over one's boundary (c). And this is apparently the case even when the person damnified has an alternative remedy by injunction (d). Indeed, it has been said that "if H. builds a house so near mine that it stops my lights or shoots water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's land and pull it down" (e). Whether that proposition can without qualification be regarded as law at the present day may be doubted; an owner of lights which are obstructed it is presumed cannot pull the obstructing house down under circumstances where the Court would refuse a mandatory injunction for its demolition. But in any case the party abating a nuisance must be careful not to interfere with the property of the wrong-doer in excess of what is necessary to abate the nuisance (f), and if there are alternative methods of abatement, one of which will be less injurious to the wrong-doer than the other, the least injurious method must be adopted, subject to this, that "where the alternative way involves an interference either with the property of an innocent person or the wrong-doer the interference must be with the property of the wrong-doer" (g).

The abator need not wait until actual damage has happened, if in the nature of things it is certain to happen; thus, if his neighbour's eaves improperly project over his land, he may pull them down before any rain has fallen (h).

In the case of nuisances to common rights, abatement by a

Nuisances
to common
rights.

(a) *Jones v. Williams*, (1843) 11 M. & W. 176; see also *Raikes v. Townsend*, (1804) 2 Smith, 9; 7 R. B. 776.

448.

(b) *Colchester Corporation v. Brooke*, (1845) 7 Q. B. 339; *Dimes v. Petley*, (1850) 15 Q. B. 276.

(e) *Rex v. Rosewell*, (1699) 2 Salk. 459.

(f) *Roberts v. Rose*, (1865) 4 H. & C. 103.

(g) *Per* Blackburn, J., *ibid.* p. 106.

(h) *Penruddock's case*, (1597) 5 Rep. p. 101.

(c) *Lemmon v. Webb*, (1895) A. C. 1.

(d) *Smith v. Giddy*, (1904) 2 K. B.

commoner is only allowed where the act causing the nuisance is *primâ facie* unlawful. Thus, where the lord of the manor puts rabbits on the common or plants trees there, inasmuch as such acts are *primâ facie* lawful, and only become wrongful if by reason thereof a sufficiency of common is not left, the *onus* of proving which insufficiency lies on the commoner, the latter, however great the nuisance may be, cannot justify digging up the rabbit-burrows (a) or cutting down the trees (b), but is left to his remedy by action; if the lord has exceeded the bounds of his right it is for the law to determine the *quantum* of the excess.

But where the lord makes an inclosure on the common, inasmuch as an inclosure is *primâ facie* wrongful, the *onus* of proving that a sufficiency of common is left lying in such case upon the lord, the commoner may justify an abatement of the nuisance by pulling down the fence, if the lord is unable to establish that he had left a sufficiency of common (c).

The building of a house upon a common, at all events if done by a stranger or another commoner (d), is on the face of it an unlawful act, and therefore a commoner may justify pulling down such house, and he may lawfully do so, even if the occupier be living in it at the time, provided he has previously given the occupier reasonable notice to remove it (e), but in the absence of such notice he cannot lawfully pull it down while the parties are in it (f).

And generally any overt act of the lord which derogates substantially from the rights of the commoners renders him liable to action (g).

If the abatement of a nuisance involve an entry upon the offender's land, and such entry be resisted, the abator probably

(a) *Cooper v. Marshall*, (1757) 1 Burr. 259.

(b) *Kirby v. Sadgrove*, (1795-7) 1 B. & P. 13.

(c) *Arlett v. Ellis*, (1827-9) 7 B. & C. 346. As to when a commoner may distrain the cattle of the lord damage feasant on the waste, see *Kenrick v. Pargiter*, (1608) Cro. Jac. 208; *Yelv.* 129.

(d) And *semble* also if the house be

built by the lord, *Perry v. Fitzhove*, (1846) 8 Q. B. 757.

(e) *Daries v. Williams*, (1851) 16 Q. B. 546.

(f) *Perry v. Fitzhove*, (1846) 8 Q. B. 757; *Jones v. Jones*, (1862) 1 H. & C. 1.

(g) *Bishop Auckland Co-operative Society v. Butterknowle Colliery Co.*, (1904) 2 Ch. 419, C. A.; *Heath v. Doane*, (1905) 2 Ch. 86.

cannot justify a resort to force, even though the abatement cannot be effected without it; it has been said that the party aggrieved is only entitled to abate "so as he commits no riot in the doing of it" (a). This seems in strict analogy to the rule that goods cannot be distrained while they are in actual use (b). In the case of *Davies v. Williams*, mentioned above, there was no averment of any assault, and the jury expressly found that the defendants did not actually endanger the lives or limbs of the plaintiff or his family (c).

Where the abatement of a nuisance involves an entry upon the land on which the nuisance exists, and such land is in the occupation of a person who was not the original creator of the nuisance, the right of abatement cannot be exercised without previous notice to the occupier (d), except perhaps where there is such immediate danger to life or health as to render it unsafe to wait (e). Probably in no other case is previous notice to the occupier necessary (f). Thus, an owner of land overhung by trees growing on his neighbour's land is entitled to cut the overhanging branches without any previous notice if he can do so without going on to his neighbour's land (g).

Notice.

In the case of an obstruction to a public way, such as the placing of posts and rails across it, any member of the public may abate the nuisance and pull the obstruction down (h), so far as is necessary to the exercise of his right of passage (i). But he cannot justify doing more than the necessity of the case requires. Consequently where a public footpath passes through a lane of varying width, also used as an occupation road, there is no

Public nuisances.

(a) 3 Bl. Com., Ch. 1, s. 4.

(b) *Field v. Adames*, (1840) 12 A. & E. 649.

(c) (1851) 16 Q. B. p. 555.

(d) *Jones v. Williams*, (1843) 11 M. & W. 176.

(e) *Per Lord Abinger, ibid.* p. 182.

(f) There is a *dictum* of Best, J., in *Earl of Lonsdale v. Nelson*, (1823) 2 B. & C. 302, to the effect that in case of nuisances of omission notice is necessary except in the case of cutting trees. This point was left open by the House of Lords in *Lemmon v. Webb*, (1895) A. C. 1.

(g) *Lemmon v. Webb*, (1895) A. C. 1.

(h) *Webber v. Sparkes*, (1842) 10 M. & W. 485.

(i) *Dimes v. Petley*, (1850) 15 Q. B. p. 283. The proposition in the head-note to this report, to the effect that "a private individual cannot justify damaging the property of another, on the ground that it is a nuisance to a public right, unless it does him a special injury," is somewhat misleading. The right of abatement is not limited to cases in which the party might bring an action, see *Winterbottom v. Lord Derby*, (1867) L. R. 2 Ex. 316.

primâ facie presumption that the public right of user extends over the whole surface of the lane at its widest part (a). Again, where property is wrongfully placed in the channel of a navigable river so as to cause a nuisance to the public right of passage, a private individual navigating a vessel in the river cannot justify damaging such property by wilfully passing over that portion of the channel where it is placed, if he might with reasonable convenience have exercised his right of passage by going over some other portion of the channel (b).

Distress
damage
feasant.

The subject of distress damage feasant will be found dealt with in the chapter on Distress (c).

Railway Fires
Act, 1905.

The Railway Fires Act, 1905 (which comes into operation on January 1st, 1908) confers by s. 2 a statutory right upon railway companies not only to enter on any land and do all things reasonably necessary for extinguishing any conflagration that may be caused by sparks emitted from engines, but also (subject to payment of full compensation, including compensation for loss of amenity, and to certain other restrictions) to remove from land adjacent to a railway any wood, undergrowth, or trees likely to catch fire (d).

(a) *Ford v. Harrow Urban Council*, (1845) 7 Q. B. 339.
(1903) 88 L. T. 394.

(c) P. 318.

(b) *Mayor of Colchester v. Brooke*, (d) 5 Edw. VII. c. 11.

Canadian Notes to Chapter VII.

SELF-REDRESS AND SELF-PROTECTION.

ATTITUDE OF DEFENCE (a).

Ontario.

The assumption of an attitude of defence by the plaintiff in the form of a challenge to fight at once will not *primâ facie* authorise the defendant's taking a club to the plaintiff after a time (b).

Force used to Prevent Another being Assaulted (c).—Wounding the plaintiff and biting off his fingers cannot be justified under the plea of *Molliter manus imposuit* to preserve the peace (d). Neither can attacking the plaintiff and biting him on the hand to

(a) P. 150, *supra*.

(b) *St. John v. Parr*, 7 U. C. C. P.

(c) P. 151, note (a), *supra*.

(d) *Shore v. Shore*, 2 O. S. 65.

prevent his breaking up a prize fight be brought under the head Ontario.
of an attempt to prevent a breach of the peace (a).

RECAPTION OF PROPERTY (b).

In trespass for breaking and entering plaintiff's barn New
defendant justified on the ground that his cattle had been Brunswick.
wrongfully taken by the plaintiff, who locked them up in his
barn and refused to give them up. Held sufficient, and that the
defendant had a right to take his cattle from the plaintiff, who
was a wrongdoer (c).

Where the plaintiff asked to be allowed to read a bond to Nova
reconvey which he had given, and after reading it refused to Scotia.
give a deed or to return the bond, the defendant recovered it by
force, and his assault was held justified (d).

RE-ENTRY ON LAND (e).

A defendant entitled to possession of a house was held justified New
in forcing open the locked door, possession having been refused Brunswick.
him (f).

EXPULSION OF INTRUDER (g).

Force may be used to expel an intruder if he has refused to Ontario.
leave, but not more force and violence than necessary; otherwise
the defendant will be liable for the excess (h).

The defendant has a right to show that assault was committed New
on his land in defence of his title (i). Brunswick.

The law in Nova Scotia is to the same effect (k).

Nova
Scotia.

The mere fact that an intruder refuses to leave upon the order Manitoba.
or demand of the occupant does not constitute an assault by the
intruder in the absence of some overt act of resistance (l).

VIOLENT TRESPASS: LIMIT OF FORCE (m).

Where the defendant's plea for shooting at and wounding Ontario.
plaintiff was that it was done to prevent plaintiff and others

(a) *Hickey v. Fitzgerald*, 41 U. C. R.
303.

(b) P. 152, *supra*.

(c) *Graham v. Green*, 5 All. 330; cf.
Turner v. Smith, 29 N. B. R. 567, recap-
tion of logs.

(d) *Holmes v. McLeod*, 25 N. S. R. 67
(1891).

(e) P. 152, *supra*.

(f) *Napier v. Ferguson*, 2 P. & B. 255.

(g) P. 152, *supra*.

(h) *Glass v. O'Grady*, 17 U. C. C.
233; *Davis v. Lennon*, 8 U. C. R. 599.

See *Madden v. Farley*, 6 U. C. R. 210.

(i) *Ex parte Estabrooks*, 19 N. B. R.
283.

(k) See *Doucette v. Therio*, 38 N. S. R.
402 (1905).

(l) *Pockett v. Pool*, 11 M. L. R. 275.

(m) P. 153, *supra*.

Ontario. from entering and assaulting him, it was held that he should have first warned the plaintiff to desist and depart (a).

DISTURBANCE IN A CHURCH.

Where there was an action for assault and battery against fourteen defendants, their plea of justification was disturbance in a church (b).

SHOOTING DOG (c).

Nova Scotia. Where the defendant, driving a nervous horse and fearing an accident, shot a dog that kept barking and jumping at the horse, he was held justified (d).

SPRING GUNS (e).

The Criminal Code of Canada, s. 249, deals with setting spring guns and man traps.

PROTECTION AGAINST FLOODS (f).

Canada. Where the owner of land is threatened with damage by water used for irrigation purposes coming from a higher level, he has a right to protect himself against such injury by all lawful means, without regard to any damage that may result to land of his neighbour from the measures he adopts (g).

ABATEMENT OF NUISANCE (h).

A person taking it upon himself to abate a nuisance (e.g., a mill dam) will be liable for any unnecessary damage to the plaintiff's property (i).

The right to abate may be lost by acquiescence in the nuisance (k).

RAILWAY FIRES ACTS (l).

See notes on p. 89h, *supra*.

(a) *Spires v. Barrick*, 14 U. C. R. 420.

(b) *Reid v. Inglis*, 12 U. C. C. P. 191; 1 Wm. & M. c. 18, held in force in Upper Canada.

(c) P. 154, *supra*.

(d) *Quigley v. Pudsey*, 26 N. S. R. 240 (1894). See *Allan v. McKay* (Manitoba), Temp. Wood, 111, as to shooting of unlicensed dog.

(e) Pp. 155, 156, *supra*.

(f) P. 157, *supra*.

(g) *McBryan v. Canadian Pacific R. W. Co.*, 29 S. C. R. 359 (1899).

(h) P. 158, *supra*.

(i) *Truesdale v. McDonald*, Tay, 121. See New Brunswick case, *Davis v. Hayden*, in Stevens' Digest, p. 786, as to abatement by person not obstructed.

(k) *Caverhill v. Robillard*, 2 S. C. R. 575.

(l) P. 162, *supra*.

CHAPTER VIII.

DISCHARGE OF TORTS.

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WHEN there is a vested right of action for a tort it may be discharged by the death of one of the parties, by waiver, by accord and satisfaction, by release, by judgment recovered, and by the Statute of Limitations. Discharge by death has been dealt with in the chapter on Parties; it remains to consider the other methods (a).

1. If a man has more than one remedy for the same wrong and elects to pursue one of them, giving the go-by to the others, he must stand and fall by his election; the other remedies are waived. "If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser and turned into money, he may maintain trespass for the forcible injury; or waiving the force he may maintain trover for the wrong; or waiving the tort altogether he may sue for money had and received" (b).

Waiver by election.

Thus, if a trespass to realty is committed, and portions of it such as minerals, timber, or fixtures, are severed, the injured party, waiving the unlawfulness of the severance, may sue in trover for the value of the severed chattels (c). So, if a man is unlawfully deprived of the possession of his property, which is afterwards sold or pledged (d), the owner may affirm the transaction, and sue the wrong-doer on a contract implied in law to

Trespass waived by suing in trover.

Trover waived by suing for money had and received.

(a) By 46 & 47 Vict. c. 52, s. 37 (1), damages for a tort are not provable in bankruptcy; bankruptcy, therefore, can never discharge a tort. The decision in *Jack v. Kipping*, (1882) 9 Q. B. D. 113, does not, it is apprehended, constitute any exception to this rule.

(b) *Per Cur. Rodgers v. Maw*, (1846) 15 M. & W. p. 448.

(c) *Dalton v. Whitem*, (1842) 3 Q. B. 961.

(d) *Allanson v. Atkinson*, (1813) 1 M. & S. 583.

By agreeing
to accept
payment.

refund the proceeds (g). The commencement of an action or of proceedings in bankruptcy to recover the money is evidence of an election to waive the tort, but not necessarily conclusive evidence. If, however, a final judgment or order is obtained in the action or proceedings, then the election is final (a). A mere demand of the money does not amount to an election (b); but in a case where the demand was assented to and a sum paid on account, it was held that the tort was waived (c). It would seem that the result would have been the same even though no payment had been made. In *Brewer v. Sparrow* (d), the defendant had sent to the plaintiff an account of the proceeds of certain goods converted by him, and after deducting expenses had paid over the balance, and it was held that the plaintiffs had waived their right to treat him as a wrong-doer. It is not, however, in every case that the mere receipt of the proceeds of a conversion operates as an election not to sue in tort. Thus, where the finder of a note had cashed it, and he being afterwards arrested on a charge of larceny, some of the money was handed over to the owner, the latter sued successfully in trover for the balance. The plaintiff, by the receipt of money under the circumstances, did not elect to treat the case as one of debt (e). Moreover, if a party agree to accept a sum certain in satisfaction of all demands, and a subsequent damage arises from the original tort which was not within the contemplation of either of the parties when such agreement was arrived at, the original accord and satisfaction apparently will not in every case debar the injured party from bringing a further action for damages against the tort-feasor (f).

Accord and
satisfaction.

2. Any one who has a cause of action may agree with the party against whom the action lies to accept in substitution for the right any good legal consideration, and by such acceptance his cause of action is satisfied, and he can proceed with it no further. This is called an accord and satisfaction.

(g) *Smith v. Hodson*, (1791) 4 T. R. 211;
Smith v. Baker, (1873) L. R. 8 C. P. 350.

(a) *Smith v. Baker*, *supra*; *Curtis v. Williamson*, (1874) L. R. 10 Q. B. 57;
Scarf v. Jardine, (1882) 7 App. Cas. 345.

(b) *Valpey v. Sanders*, (1848) 5 C. B. 886.

(c) *Lythgoe v. Vernon*, (1860) 5 H. &

N. 180.

(d) (1827) 7 B. & C. 310.

(e) *Burn v. Morris*, (1836) 4 Tyr. 485. As to the effect of waiver where the cause of action is by or against joint parties, see below, p. 184.

(f) *Ellen v. Great Northern R. Co.*, (1901) 49 W. R. 395.

A criminal offence, although involving a tort, cannot, however, be compounded for by an accord and satisfaction (a).

A bare accord amounts simply to an understanding between the parties that something shall be done in future which the aggrieved person shall take in satisfaction of his claim, and so long as it remains executory cannot be enforced by either party. The plaintiff cannot sue upon it in substitution for his original cause of action (b), nor can the defendant set it up as a defence to that cause of action. "If divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed. . . . Also, if the thing be to be performed at a day to come, tender and refusal is not sufficient without actual satisfaction and acceptance" (c). If one man agree to take a bill of exchange from another in satisfaction of a claim and receive it by post, he may, nevertheless, at once repudiate the transaction, for the mere receipt is not an acceptance; and unless he assent to the receipt he is not satisfied (d).

Accord without satisfaction.

The arrangement, however, may be that the cause of action shall be satisfied, not in the future on certain things being done, but forthwith by the mere agreement to do certain things. "There may be two kinds of accord: the making of the agreement itself may be what is stipulated for, or the doing the things mentioned in the agreement. In the latter case the plea . . . ought to aver that the things have been done, and the agreement without that affords no answer. Where the making of the agreement is itself the thing looked to, the plea must aver that it has been accepted in satisfaction; that averment in truth carries with it the fact of the performance of all that was to be done in order to settle the action; it leaves nothing *in fieri*, nothing incomplete" (e).

Mere agreement taken in satisfaction.

Sometimes the accord is self-executing, as, for instance, where parties agree mutually to relinquish claims which they have

Self-executing accord.

(a) *Smith v. Dean*, (1903) 88 L. T. 664. *Gabriel v. Dresser*, (1855) 15 C. B. 622.

(b) *Lynn v. Bruce*, (1794) 2 H. Bl. 317. (d) *Hardman v. Bellhouse*, (1842) 9 M. & W. 596.

(c) *Peytor's case*, (1611) 9 Rep. p. 79 b; (e) *Per Coleridge, J., Flockton v. Wray v. Milestone*, (1839) 5 M. & W. 21; *Hall*, (1850) 14 Q. B. p. 386.

against each other. Such agreement *ipso facto* puts an end to the rights of action on either side (a).

Accord without binding contract.

An executory accord need not fulfil all the requirements of a binding contract, since *ex hypothesi* till it is executed it binds neither side, and after execution the question is not whether it could have been enforced, but whether it has in fact been accepted (b). But where a party agrees to take in satisfaction of his cause of action not the fulfilment of a promise, but the promise itself, all conditions must be present to make that promise legally binding, since otherwise he will obtain nothing in return for the surrender of his cause of action (c). In both cases alike there must be good legal consideration. "In an action upon the statute of Richard II., if the defendant saith that after the entry an accord was made between them that the plaintiff should re-enter the land and the defendant should deliver the evidence of the plaintiff to the plaintiff, this is not any bar of the action, for the delivery of the plaintiff's evidences cannot be any satisfaction of the tortious entry. But, otherwise, it is if he says that the accord was that he should deliver certain evidence concerning the land to the plaintiff and that he delivered them accordingly, this is a good bar if he makes title to the evidences" (d).

There must be good consideration.

Accord and satisfaction by arbitration.

If a claim for damages be referred to arbitration and the award be made, it may be pleaded as an accord and satisfaction though not performed; but before award the pendency of an arbitration is no defence to an action, though it may be a ground of stay (e).

Conditional accord and satisfaction.

It would appear that it is possible to make an accord and satisfaction conditional. A man may accept a sum as satisfaction of personal injuries on the understanding that if the mischief

(a) *Jones v. Sawkins*, (1847) 5 C. B. 450.
 142; *Crowther v. Farrer*, (1850) 15 Q. B. 677; cp. *James v. David*, (1793) 5 T. R. 141, where there was an agreement to settle matters in dispute, and to execute bonds not to sue. Here the accord was clearly executory because it was contemplated that further steps should be taken.

(b) *Lacey v. Turley*, (1861) 6 H. & N. 239.

(c) *Case v. Barber*, (1672) T. Raym.

450.

(d) Vin. Ab. Accord. A 4, citing 9 Edw. IV. 19. As to consideration, see *McManus v. Bark*, (1870) L. R. 5 Ex. 65; *Boosey v. Wood*, (1865) 3 H. & C. 484. The abandonment of claims *bonâ fide* made though in fact unfounded is good consideration (*Callisher v. Bischoffsheim*, (1870) L. R. 5 Q. B. 449).

(e) *Allan v. Milner*, (1831) 2 C. & J. 47; *Harris v. Reynolds*, (1845) 7 Q. B. 71.

should turn out worse than it appears to the medical men at the time, he is not precluded from bringing his action (a).

And even without a specific understanding, under certain exceptional circumstances, action has been held to be maintainable (b).

But accord and satisfaction with one of several enures to all ; consequently the acceptance of satisfaction from a joint tortfeasor discharges co-wrong-doers (c).

Nor is it necessary in a plea of accord and satisfaction with one of several plaintiffs to aver authority from the others (d).

3. Any surrender of a right of action may be spoken of as a release. release ; but the term is usually applied where the surrender is by deed, and, therefore, requires no consideration (e). A release by indenture is only available in favour of those who are expressed as parties thereto (f). An absolute covenant not to sue is equivalent to a release, and may be so pleaded (g).

4. When an action is brought and proceeds to final judgment, Judgment recovered. the original right of action is in any case destroyed. If the plaintiff fails, he is estopped from asserting his alleged right in any other form of legal proceedings against the same party (h). If he succeeds, the original right in respect of which he sued is merged in the higher and better right which he obtains by his judgment, and he must either bring a fresh action on his judgment or proceed to obtain its fruits by execution.

Again, action by a third party against an agent bars a subsequent action, in respect of the same matter, against his principal (i).

There is, however, no merger by a judgment which is not of record. The judgment of a foreign court only creates a simple Judgment must be of record—foreign judgments.

(a) *Lee v. Lancashire & Yorkshire R. Co.*, (1871) L. R. 6 Ch. 527.

(b) *Ellen v. Great Northern R. Co.*, (1901) 49 W. R. 395 ; affirmed, (1901) 17 T. L. R. 453.

(c) *Dufresne v. Hutchinson*, (1810) 3 Taunt. 117 ; *Thurman v. Wild*, (1840) 11 Ad. & E. 453.

(d) *Wallace and Others v. Kelsall*, (1840) 7 M. & W. 264.

(e) For an example of a release of an action of tort, see *Phillips v. Clagget*,

(1843) 11 M. & W. 84.

(f) *Storer v. Gordon*, (1814) 3 M. & S. 308.

(g) *Per Cur. Ford v. Beech*, (1848) 11 Q. B. p. 871. As to the effect of accord and satisfaction and release to or by joint parties, see below, p. 184.

(h) For statutory exception to this see 60 & 61 Vict. c. 37, s. 1, subs.

(i) *Cross & Co. v. Matthews and Wallace*, (1904) 91 L. T. 500.

contract debt, and, although it may estop the parties from disputing the matters of fact there decided, does not destroy the cause of action (a). It is otherwise, however, if the judgment be satisfied (b).

Damages for one cause of action must be recovered once for all.

“The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same” (c). Damages resulting from one and the same cause of action must be assessed and recovered once and for all on the principle ‘*Interest reipublicæ ut sit finis litium.*’ But in applying this rule it is often a matter of difficulty to determine whether the cause of action in respect of which damages are being sought is the same cause as that for which damages have already been recovered in an earlier action.

When causes of action are the same.

A plaintiff is not bound to bring forward in one action all the grievances which he may have against the defendant arising out of the same transaction. Thus, if A. wrongfully charges B. with some crime and has him arrested and prosecuted, there is no objection to B. bringing two separate actions, one for the malicious prosecution and one for the false imprisonment (d), and the plea of judgment recovered in one of these actions will not be any bar to the maintenance of the other. Even where there is but one wrongful act, if by means of it two distinct rights are infringed, the infringement of each right will give rise to a distinct cause of action. For this purpose it has been determined that injury to property and injury to the person, although caused by one and the same wrongful act, are infringements of different and independent rights, and therefore a recovery of damages in such case for the injury to the property will not operate as a bar to a subsequent action in respect of the injury to the person (e); and this is so whether the damage was the result of a direct trespass or the result of negligence (f).

Successive damages.

On the other hand, where a man suffers in respect of one and

(a) *Higgins' case*, (1605) 6 Rep. p. 45 ;
Smith v. Nicolls, (1839) 5 Bing. N. C.
 208 ; *Bank of Australia v. Harding*,
 (1850) 9 C. B. 661.

(b) *Barber v. Lamb*, (1860) 8 C. B.
 N. S. 95. See below, p. 172. As to the
 registration of Scotch and Irish judg-
 ments in this country, see 31 & 32 Vict.

c. 54 ; 45 & 46 Vict. c. 31.

(c) *Per Bovill, J., Gibbs v. Cruik-*
shank, (1873) L. R. 8 C. P. p. 460.

(d) *Guent v. Warren*, (1854) 9 Ex.
 379.

(e) *Brunsdon v. Humphrey*, (1884)
 14 Q. B. D. 141.

(f) *Per Bowen, L.J., ibid.* p. 149.

the same right, whether of the person, property or reputation as the case may be, successive damages as the result of the same wrongful act, then if the act is not a continuing act, but one over the consequences of which when done the doer has no further control, such as a blow struck or a slander spoken, the causes of action in respect of the several heads of damage are the same, and after recovery in an action for the damage first accruing no fresh action can be brought; and this is so whether the act be actionable *per se* or only derives its actionable quality from the occurrence of some damage (a). Thus, it has been held, if after judgment recovered in an action of assault some bodily injury develops itself which was unsuspected at the time of assessing the damages, a second action will not lie (b). But this doctrine, at least in civil cases, is not easily reconcileable with the decision of the Court of Appeal in the case of *Ellen v. Great Northern Railway Company* (c), in which it was held that the following document: "Received of the Great Northern Railway Company the sum of one hundred and ninety pounds in full satisfaction and discharge of all claims, legal and medical charges included, in respect of injuries sustained by Mr. T. E. J. Ellen, near Babworth Crossing, Retford," was no more than a receipt for money, and did not constitute such an agreement as would bar a subsequently accruing ground of action for damage not within the contemplation of the parties when the receipt was given. It has, however, been held in an action by a master for beating his apprentice *per quod servitium amisit* that a fresh action could not be brought from time to time as fresh damage accrued, and that consequently prospective damages might be given (d). And the same rule holds with regard to the action for slander, whether the words be actionable in themselves (e) or not (f). And

Receipt
no bar to
subsequent
action.

When no
fresh action
for fresh
damage is
maintainable

(a) In *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas., p. 145, Lord Bramwell suggested that the question whether successive actions would lie depended upon whether the act complained of was actionable without proof of damage or not. But this view will not fit the cases.

(b) *Fitter v. Veal*, (1701) 12 Mod. 542.

(c) (1901) 17 T. L. R. 453, C. A.

(d) *Hodsoll v. Stallebrass*, (1840) 11 A. & E. 301, and see *Clarke v. Yorke*, (1882) 47 L. T. 381.

(e) *Per* Lord Holt, *Fittar v. Veal*, (1701) 12 Mod. p. 544.

(f) *Per* Lord Holt, *ibid.*; *per* Manisty, J., *Lamb v. Walker*, (1878) 3 Q. B. D. p. 395; *per* Lord Blackburn, *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. p. 143: though see *contra*, *per* North, C.J., *Townsend v.*

presumably the same rule will apply to the case of fraud notwithstanding that until damage happens there is no cause of action ; thus, if in consequence of a fraudulent misrepresentation a person on different occasions buys different parcels of stock, it is apprehended that he cannot have a separate action for each parcel. It has been said that for the purpose of this rule,—that different damages in respect of the same right must, if caused by one and the same act, be recovered in the same action,—injuries to different parts of a man's person caused by different blows struck in the course of the same assault are to be treated as caused by the same wrongful act (a). *A fortiori* a publication containing a number of defamatory statements is to be regarded as but one wrongful act ; so that it is not open to the aggrieved party to pick out certain sentences and sue upon them, and then after judgment recovered to sue upon other portions of the libel (b).

Continuing
injury.

If the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance, then in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*, and in cases in which damage is of the essence of the action, as in nuisance, a fresh cause of action arises as often as fresh damage accrues. Whenever one person wrongfully puts something upon the land of another, he is not only liable to pay damages for the trespass in placing the thing there, but he is further under an obligation to remove it, and is guilty of a continuing trespass as long as he neglects to do so. Thus, where the trustees of a turnpike road built buttresses to support it on the land of the plaintiff, who sued them in trespass for the erection and accepted money paid into Court in full satisfaction of his claim, it was held that the acceptance of such money was no bar to a subsequent action of trespass for continuing the buttresses there (c).

But where a man wrongfully interferes with another's land

Hughes, (1677) 2 Mod. p. 150, and *per* Lord Bramwell, 11 App. Cas. p. 145.

(a) *Per* Lord Esher, (1890) 25 Q. B. D. p. 8.

(b) *Macdougall v. Knight*, (1890) 25

Q. B. D. 1.

(c) *Holmes v. Wilson*, (1839) 10 A. & E. 503, and see *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127.

otherwise than by placing some foreign substance on it, as for instance where he digs a hole in it, although such interference may create a continuing source of injury, he is liable only to pay compensation for the original trespass, and is under no further obligation to prevent the continuance of the state of things which he had created (a); consequently in such cases the damages must be recovered once and for all. In the case of continuing nuisances successive actions may from time to time be brought in respect of their continuance (b), and therefore in actions for a nuisance prospective damages cannot be given (c), except perhaps in the case of obstruction of ancient lights (d), though even then the point is a very doubtful one, for either the Court will grant a mandatory injunction which abolishes the nuisance altogether (e), or, should the circumstances not warrant the adoption of such a course, will probably grant as damages, once and for all, the difference between the original and the diminished value of the plaintiff's property (f). But though it seems probable for the above reasons that there can be no continuing damages in nuisance, there may be two or more actions arising out of the same tort. Thus if a lessee of premises, demised by a life-tenant, with remainder over, sues and recovers damages from a neighbouring householder for having blocked his ancient lights, the damages recovered in such action will not preclude the life tenant from also recovering compensation for the loss he will sustain upon the termination of the lease through the depreciated value of his property, while the reversioner will be entitled to sue for the damage he will ultimately experience from the same cause upon the death of the life tenant. In the case of damage caused by the withdrawal of support to land a fresh action may be brought as each fresh subsidence occurs, although the several subsidences result from the same excavation (g), for where an

(a) *Clegg v. Dearden*, (1848) 12 Q. B. 576.

(b) *Whitehouse v. Fellows*, (1861) 10 C. B. N. S. 765; *Shadwell v. Hutchinson*, (1831) 2 B. & Ad. 97.

(c) *Battisill v. Reed*, (1856) 18 C. B. 696.

(d) *Jenks v. Clifden (Viscount)*, (1897) 1 Ch. 694.

(e) *Cowper v. Laidler*, (1903) 2 Ch. 337.

(f) *Kine v. Jolly*, (1905) 1 Ch. 504, C. A.; *Moore v. Hall*, (1878) 3 Q. B. D. 178.

(g) *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127; *Crumbie v. Wallsend Local Board*, (1891) 1 Q. B. 503; and see *Barr v.*

agent avoids any contract which the principal may have made by reason of such tainted advice (a).

The judgment of a foreign court, or of an inferior court not of record, as is pointed out above, is in itself no bar to an action, but appears to be something in the nature of an accord (b). If, therefore, it is carried into effect, it amounts in general to a complete satisfaction. But it is otherwise when the carrying into effect of the award of a court of special and limited jurisdiction will not necessarily satisfy a whole cause of action. In *Midland R. Co. v. Martin & Co.* (c), the defendants had obtained from a magistrate an order for the delivering up of certain goods detained by the plaintiffs. They counterclaimed for the special damage caused by the detention, and it was held that they might well do so, since the magistrate had no jurisdiction to deal with the special damage. So in *Nelson v. Couch* (d) it was held that the enforcing of a maritime lien against a vessel for damage caused by the negligence of those in charge of her was no answer to an action for the same negligence, unless it appeared that full satisfaction had been obtained.

Effect of
proceedings
before a
magistrate.

In certain cases previous proceedings before a magistrate founded on the same subject-matter form a statutory defence to an action of assault. By 24 & 25 Vict. c. 100, ss. 42, 43, magistrates have power to convict summarily persons charged with common assaults and certain assaults on women and children under fourteen, and either to imprison or to impose a fine and costs. By s. 44, if the justices upon hearing such charges "upon the merits, where the complaint was preferred by or on behalf of the party aggrieved, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall

(a) *Shipray v. Broadwood*, (1899) 1 Q. B. 369. As to when secret commission received, without fraud, by an agent does not avoid his right to payment of an agreed commission by his principal, see *Hippisley v. Knee Bros.*, (1905) 1 K. B. 1.

(b) See *Smith v. Nicolls*, (1839) 5

Bing. N. C. 208; *Barber v. Lamb*, (1860) 8 C. B. N. S. 95; *Wright v. London Omnibus Co.*, (1877) 2 Q. B. D. 271. As to the plea of judgment recovered by or against joint parties see below, p. 184.

(c) (1893) 2 Q. B. 172.

(d) (1863) 15 C. B. N. S. 99.

deliver such certificate to the party against whom the complaint was preferred." The hearing, it is to be observed, must be upon the merits. In *Reed v. Nutt* (a) the plaintiff had taken out a summons for assault against the defendant. He subsequently gave him notice that he should not further prosecute the summons. The defendant nevertheless attended before the magistrate and obtained a certificate of dismissal. The plaintiff subsequently brought an action for the assault, and it was held that the certificate was invalid, not having been given after a hearing on the merits, and was consequently no bar to the action (b). By s. 45 the party obtaining such a certificate shall be released from all further proceedings, civil or criminal, for the same cause, whether immediate or consequential (c), and the same effect follows if he is convicted and has served his imprisonment or paid the whole amount adjudged against him.

In the case of a dismissal of the charge, it is the granting of the certificate and not the dismissal itself which operates as a release; the certificate can only be proved by itself, and therefore it must show upon the face of it that there was *such* dismissal as is contemplated by the Act, namely, after a hearing "on the merits," and upon one of the grounds mentioned in the Act (d). The magistrates are bound to grant the certificate upon application, and may be compelled to do so by *mandamus* (e). No time is limited within which the application must be made. The word "'forthwith' in the section does not make the immediate grant of the certificate a condition of its validity, but means forthwith if demanded" (f).

If the defence relied on is a conviction this must be proved by the production of the original record, or an examined copy (g).

(a) (1890) 24 Q. B. D. 669.

(b) Whether the proper course would not be first to quash the certificate on *certiorari, quare*; see *per* Lord Coleridge, *ibid.* p. 674.

(c) *Masper v. Brown*, (1876) 34 L. T. N. S. 254; 1 C. P. D. 97.

(d) *Skuse v. Davis*, (1839) 10 A. & E. 635.

(e) *Hancock v. Somes*, (1859) 1 E. & E.

795.

(f) *Costar v. Hetherington*, (1859) 1 E. & E. 802; overruling *Reg. v. Robinson*, (1840) 12 A. & E. 672.

(g) Strictly speaking, of course there is no *record*, but the magistrates are bound if required to certify their judgment in writing, *per* Byles, J., *Hartley v. Hindmarsh*, (1866) 1 L. R. 1 C. P. p. 556.

If the justices simply bind over the party summoned there is no conviction within the meaning of the Act (a).

Proceedings
by other
parties.

Sect. 45 relieves the party from all further proceedings, whether at the suit of the party assaulted or of any one else. A master cannot recover for loss of service occasioned by an assault on his servant, or a husband for his injury consequential on an assault upon his wife (b).

Statutes
of Limitation.

5. By 21 Jac. I. c. 16, s. 3, it is provided "that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover and replevin for taking away of goods and cattle, all actions . . . upon the case . . . and all actions of assault, menace, battery, wounding and imprisonment . . . shall be commenced and sued within the time and limitation hereafter expressed and not after, that is to say, the said actions upon the case (other than for slander) . . . and the said actions for trespass, . . . detinue and replevin for goods or cattle, and the said action of trespass *quare clausum fregit* . . . within six years next after the cause of such actions or suit and not after, and the said actions of trespass, of assault, battery, wounding and imprisonment, or any of them, . . . within four years next after the cause of such actions or suit and not after, and the said action upon the case for words . . . within two years next after the words spoken and not after" (c).

By the term "action upon the case for words" is intended only slander actionable in itself. Slander actionable by reason of special damage, slander of title, and libel are not included, but come under the general class of actions on the case (d). The result is that for slander actionable in itself the period of limitation is two years, for trespass to the person four years, for other torts six years. And for the purpose of computing the time the statute runs from the date of the actual damage (e).

(a) *Hartley v. Hindmarsh*, (1866) L. R. 1 C. P. 553.

(b) *Masper v. Brown*, (1876) 1 C. P. D. 97.

(c) As to ejectment, see Ch. XIII. As to the special periods of limitation by and against executors and administrators, see above, pp. 52-56.

(d) *Law v. Harwood*, (1627) Cro. Car. 140; *Saunders v. Edwards*, (1662) 1 Sid. 95. See, however, *per* Lord Cranworth, *Backhouse v. Bonomi*, (1858-61) 9 H. L. C. p. 513.

(e) *Backhouse v. Bonomi*, (1861) 9 H. L. C. 503.

By s. 7 of the same Act, if any person at the time when his cause of action accrues is "within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas," the period of limitation is not to begin to run until the disability ceases. However, the second of these disabilities is now removed by 45 & 46 Vict. c. 75, s. 1, and the fourth and fifth by 19 & 20 Vict. c. 97, s. 10.

By 4 & 5 Anne, c. 16, s. 19, if any person against whom exists any one of the causes of action mentioned in the statute of James is at the time of the accrual of the cause of action beyond the seas, the period of limitation does not begin to run until his return. By 19 & 20 Vict. c. 97, s. 12, no part of the United Kingdom nor the Islands of Man, Guernsey, Jersey, Alderney, Sark, nor any Islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond the seas within the meaning of the above-cited statute of Anne. If a defendant come within the seas for however short a time, the statute begins to run even though his presence be unknown (a). Where there is a conflict of time between the British Statutes of Limitation and a foreign or colonial statute in an action commenced in this country, the former prevail, provided the effect of the foreign or colonial statute is not to extinguish the liability but merely to bar the remedy (b).

The ambassador of a foreign Government in this country, in virtue of his privilege of extritoriality, cannot be sued (c), and the statute does not begin to run in his favour any more than if he were actually beyond the seas (d).

The effect of these various exceptions is that the party suing has the whole excepted time *plus* the ordinary period of limitation in which to bring his action. Consequently, a defendant against whom a cause of action accrues while beyond the seas may be sued at any time before his return, and also within the limited

(a) *Gregory v. Hurrill*, 5 B. & C. 341. As to the effect of foreign statutes of limitation where the tort is committed abroad, see above, p. 118.

(b) *Alliance Bank of Simla v. Carey*, (1880) 5 C. P. D. 429; *Finch v. Finch*, (1876) 45 L. J. Ch. 816; *Harris v. Quine*, (1869) L. R. 4 Q. B. 653.

(c) See above, p. 42.

(d) *Musurus Bey v. Gaddan*, (1894) 1 Q. B. 533; (1894) 2 Q. B. 352. In this case it was also held that Ord. XI. of the rules of 1883, providing for service of writs abroad, does not in any way affect the provisions of 4 & 5 Anne, c. 3, s. 19.

time after it. His return does not create a fresh cause of action from which the statute begins to run (a).

By the Public Authorities Protection Act (b), which applies only to acts done and to neglects and defaults in the execution or intended execution of an Act of Parliament or of a public duty or authority (c), (and does not include a private duty, arising out of a contract entered into by a public authority (d)), it is provided that where "any action . . . is commenced . . . against any person for any act done in pursuance or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, . . . the action shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of (e), or in the case of a continuance of injury or damage (f) within six months next after the ceasing thereof" (g). The Act sweeps away a great number of special limitation sections under different Acts of Parliament, and substitutes for them a general enactment covering all cases of the attempted execution of a statutory duty. It also greatly alters the law by giving for the first time a protection to those executing a public duty or authority which exists not by virtue of any statute, but at common law. The precise effect of the words "public duty or authority" has yet to receive judicial interpretation in many cases, though it has been held that they apply to officials, acting in their official capacity, under the direction of a county council (h), and to a medical practitioner, in private practice, who gives the notification required by statute in a case of illness, wrongly diagnosed by him (i). It is also clear that a sheriff who wrongfully seizes under a writ of *fi. fa.* is within the protection of the Act. But, on the other hand, it has been held *not* to apply to an independent contractor, doing under contract and for his own profit, work which a public

(a) *Forbes v. Smith*, (1855) 11 Ex. 161.

(b) 56 & 57 Vict. c. 61, s. 1.

(c) *O'Brien v. Mitchelstown Loan Fund*, (1903) 1 Ir. R. 282, C. A.

(d) *Sharpington v. Fulham Guardians*, (1904) 2 Ch. 449.

(e) *Cree v. Vestry of St. Pancras*, (1899) 1 Q. B. 693.

(f) See next page.

(g) As to the kind of cases that come within the scope of this enactment, see above, pp. 121, *seq.*

(h) *Greenwell v. Howell*, (1900) 1 Q. B. 535, C. A.

(i) *Salisbury v. Gould*, (1904) 68 J. P. 158.

authority has been authorised to do (a); or to proceedings for a rule *nisi* for a *quo warranto* for the purposes of costs (b). It may be doubted whether a private individual, who gave a man in charge under the mistaken belief that a felony had been committed, would be within such protection, although in a sense he would be intending to act in the execution of a public duty. The statute seems to be designed for the protection of public functionaries (c).

The period of limitation begins at the time when the cause of action is first complete (d). When, therefore, there is a trespass or other act which of itself constitutes a wrong, the action must be brought within the appointed time from the act itself. And this rule applies where it is sought to charge a public authority with the expenses of extraordinary traffic. Even when the act complained of comes within the mischief contemplated by the Locomotives Act 1898, which provides (s. 12 (1) (b)), that proceedings "shall be commenced within twelve months of the time at which the damage has been done" (e). But in actions of which the gist is some consequential damage, then, inasmuch as without damage there is no action, the statute does not begin to run until the damage accrues (f).

When statute begins to run.

Where there is a continuing nuisance or a continuing trespass, every fresh continuance is a fresh cause of action, apparently relating back to the original wrong, and therefore an injured party who sues after the cessation of the wrong may recover not only for such portions of it as lie within the period limited; but also for earlier infringements committed within the period of six years limited by the Statute of Limitations (g). And this rule

Continuing wrongs.

(a) *T. Tilling, Ltd., v. Dick, Kerr & Co., Ltd.*, (1905) 1 K. B. 562.

(b) *Rea v. Carter*, (1904) 68 J. P. 466.

(c) As for the period of limitation where it is necessary to prove title to land, see Ch. XIII.

(d) *Lyles v. Southend Corporation* (1905) 2 K. B. 1, C. A.

(e) *Parker v. London County Council*, (1904) 2 K. B. 501.

(f) *Roberts v. Read*, (1812) 16 East, 215. In this case the decision was on a statute which limited the time from the

"fact committed." Nevertheless it was held that the time began to run, not from the doing of the wrongful act, but from the suffering of the damage. Where negligence is a breach of contract as well as a tort, the time begins to run from the negligent act; see *Howell v. Young*, (1826) 5 B. & C. 259. As to fraud, see *per* Field, J., *Gibbs v. Guild*, (1881) 8 Q. B. D. p. 301.

(g) *Harrington, Earl of v. Derby Corporation*, (1905) 1 Ch. 206.

that the continuance of a trespass gives rise, at any period during such continuance, to a fresh cause of action has been held to apply in cases of trespass to the person. Thus, where the plaintiff was discharged from a wrongful imprisonment of a month's duration on the fourteenth of December and issued his writ on the fourteenth of June (the period of limitation being six months), it was held that he was entitled to sue in respect of the trespass to his person committed on the fourteenth of December (*a*). But where a defendant maliciously opposed the discharge from custody of the plaintiff insolvent, and thereby caused a prolongation of his imprisonment under the Judge's order, the time was held to run from the malicious act, and not from the termination of the imprisonment, which although a damage, was not a continuing wrong, the detention of the plaintiff being the act of the Court (*b*). In cases of withdrawal of support, each subsidence is an independent cause of action, and may be sued for within the period limited (*c*); and when the subsidence is a continuing process, each fresh damage caused by its continuance is a fresh wrong (*d*).

The liability of a husband under 45 & 46 Vict. 75, s. 14, for a premarital tort of the wife does not constitute a fresh cause of action. When the action is statute-barred as against the wife it is statute-barred also against the husband (*e*).

It sometimes happens that there is no person in existence capable of availing himself of a cause of action otherwise complete. In such cases it appears that the statute begins to run not from the time when the wrongful act is done or the damage occurs, but from the time when the plaintiff first acquires title. "It cannot be said that a cause of action exists unless there is also a person in existence capable of suing" (*f*). Thus, if between the death of an intestate and the taking out letters of administration any act of trespass or trover is done to his chattels.

Where no
person
capable of
suing.

(*a*) *Hardy v. Ryle*, (1829) 9 B. & C. 603.

(*b*) *Violet v. Sympton*, (1857) 8 E. & B. 344.

(*c*) *Backhouse v. Bonomi*, (1858-61) E. B. & E. 622; 9 H. L. C. 503; *Darley Main Colliery Co. v. Mitchell*, (1886) 11

App. Cas. 127.

(*d*) *Crumbie v. Wallsend Local Board*, (1891) 1 Q. B. 503.

(*e*) *Beck v. Pierce*, (1889) 23 Q. B. 11, 316.

(*f*) *Per Cur. Murray v. East India Co.*, (1821) 5 B. & Ald. p. 214.

the administrator can sue within six years of grant of administration (a). But the same rule does not apply in the case of an executor, who may commence an action on his title before taking out probate, though he cannot succeed at the trial unless he has proved the will in the interval (b).

When the period of limitation once commences it is not broken by any subsequently accruing disability, nor by the fact that for the time being there was nobody in existence who could sue. If a person having a vested cause of action dies before he can commence proceedings, and no personal representative is appointed until the time has expired, the action is barred (c).

No suspension after time has once begun to run.

In computing the time of limitation the day on which the cause of action arose is, as a rule, to be excluded, and the day on which the action is commenced is to be included. The principle is that "where the act done from which the computation is made is one to which the party against whom it runs is privy, the day of the act done may reasonably be included; but where it is one to which he is a stranger it ought to be excluded" (d).

How time computed.

Subject to the exception pointed out hereafter, the right to recover possession of a chattel is not affected by lapse of time. With regard to realty the law is clear that possession for a sufficient lapse of time confers an indefeasible title. The effect of 3 & 4 Will. IV. c. 27, is to "make a parliamentary conveyance of the land" (e). The effect of the statute of James, however, is different. It does not bar the right, but the remedy. Thus, in the case of a debt more than six years old, if the defendant does not plead the statute the law will "treat the debt as an existing obligation, and lend the process of the Court to enforce its discharge" (f), and on the same principle a statute-barred debt may without further consideration be renewed by acknowledgment.

Limitation of actions of trover.

(a) *Pratt v. Swaine*, (1828) 8 B. & C. 285.

(b) See *Williams on Executors*, Pt. i. Bk. iv. Ch i. § ii. See, too, *Plant v. Cotton*, (1860) 5 H. & N. 430, a case of the assignees of a bankrupt suing for a tort committed between the bankruptcy and their appointment.

(c) *Rhodes v. Smethurst*, (1838-40) 4 M. & W. 42; 6 M. & W. 351; *Boat-*

wright v. Boutwright, (1873) L. R. 7 Eq. 71.

(d) *Per Cur. Hardy v. Ryle*, (1829) 9 B. & C. p. 608.

(e) *Per Parke, B., Doe v. Sumner*, (1845) 14 M. & W. p. 42; *Trustees of Dundee Harbour, v. Dougall*, (1852) 1 Macq. H. L. 317.

(f) *Per Lord Penzance, Coombs v. Coombs*, (1866) L. R. 1 P. & D. p. 289.

It follows, therefore, that when the owner of a chattel has been wrongfully deprived of it, although by lapse of time he may be prevented from suing the wrongdoer, yet that he does not lose his property by mere continuance of dispossession, and consequently that he may sue for every fresh wrongful act. Thus, in *Miller v. Dell* (a), A. was possessed of a lease which more than six years before the action had been fraudulently deposited by B. with C. as security for a loan. C. became bankrupt, and his trustee made over the lease to D. A. thereupon demanded the lease from D., and upon his refusal sued him for a conversion, and recovered. It was held that the statute only barred the remedy against B. and C., and that though D. claimed under them, time only began to run in his favour from the date of the wrong which he himself had committed.

If, however, one and the same person, being a stranger to the party entitled, is guilty of successive acts of conversion with respect to the same chattel, the period of limitation begins to run from the date of the first act, and is not extended by any subsequent act (b). It is, however, otherwise as between bailor and bailee. If a bailee is sued for refusing to deliver up to his bailor the chattel entrusted to him he cannot be heard to say that more than six years before he had converted it to his own use (c).

And where a transaction between two parties is tainted by an original misrepresentation by one of them, neither *laches* nor condonation will be imputed to a plaintiff who has continued to make payments (under protest) after finding out the misrepresentation. Such payments being held not to amount to an affirmation of the contract by him (d).

Concealed
fraud.

The mere fact that a person possessing a right of action was

(a) (1891) 1 Q. B. 468. The reasoning of the case is perfectly general. However, Lord Esher (pp. 471-2) adverts to the fact that the subject-matter of the action was a title deed, and therefore probably stood on a special footing. It has been said that, the possession of title deeds being simply ancillary to the possession of land, the right to recover the deeds is not lost so long as the right to recover the land remains. See *per* Pollock, C.B., *Plant v.*

Cotterill, (1860) 5 H. & N. p. 440.

(b) *Philput v. Kelly*, (1835) 3 A. & E. 106; *Wilkinson v. Verity*, (1871) L. R. 6 C. P. 206.

(c) *Wilkinson v. Verity*, *supra*. Even if the bailee no longer has the goods in his possession, he may be sued in detinue, though the action of trover may be barred (*Granger v. George*, (1826) 5 B. & C. 149). See below, p. 255.

(d) *Molloy v. Mutual Reserve Life Assurance Co.*, (1905) 22 T. L. R. 59.

unable to sue by reason of his ignorance of his right was not in the Courts of Common Law an answer to a plea of the Statutes of Limitation (a). The Courts of Equity, however, which did not consider themselves strictly bound by these statutes, introduced an exception in cases of "concealed fraud" (b), which by 3 & 4 Will. IV. c. 27, s. 26, received a statutory recognition with respect to actions relating to real property.

The doctrine of "concealed fraud," or, as it perhaps might be more conveniently termed, fraudulent concealment, is that so long as a party is ignorant that he possesses any right at all, or knowing of his right is ignorant that it has been infringed, the statute does not run against him, provided that in the first place his ignorance is not due to his own negligence, and secondly is due to the misconduct of the person relying on the statute or of some one privy with him (c). Thus it was held that the statute did not run in a case in which an agent, who was an express trustee, after receiving moneys on account of his principal wilfully omitted to account for them (d). Where, however, the "fraud" is neither that of the person setting up the statute nor of his predecessors in title, s. 26 of the Real Property Limitation Act, 1833, does not apply (e). In one case, indeed, it was said (f) that a mining trespass innocently committed was concealed fraud, but this seems altogether opposed to the other authorities (g), and has since been disapproved by the Privy Council (h).

The application of the doctrine in common law actions has been discussed in two cases since the Judicature Act (i). It is clear that where the action is brought for relief which was within the original equitable jurisdiction of the Court of Chancery, as

(a) *Imperial Gas Light & Coke Co. v. London Gas Light Co.*, (1854) 10 Ex. 39.

(b) This subject is considered more fully below, pp. 374-375.

(c) *Thorne v. Heard*, (1895) A. C. 495. See below, p. 374.

(d) *North American Land & Timber Co. v. Watkins*, (1904) 2 Ch. 233, C. A.

(e) *McCallum, In re, McCallum v. McCallum*, (1900) 49 W. R. 129.

(f) *Per Malins, V.-C., Ecclesiastical Commissioners v. North Eastern R. Co.*, (1877) 4 Ch. D. p. 860.

(g) *Per Kindersley, V.-C., Petre v. Petre*, (1852) 1 Drew. p. 397; *Dean v. Thwaite*, (1855) 21 Beav. 621.

(h) *Bulli Coal Mining Co. v. Osborne*, (1899) A. C. 351.

(i) *Gibbs v. Guild*, (1882) 8 Q. B. D. 296; 9 Q. B. D. 59; *Armstrong v. Milburn*, (1886) 54 L. T. N. S. 247, 723.

Disability
of joint
plaintiff.

The disability of one of the parties in whom a joint right of action vests does not prevent the statute running, for the party not under disability may use the name of the other to sue, just as he may release or accept satisfaction on his behalf (a).

damage applies where the part owner seeks to recover on the strength of his title. If he is in actual possession the rule is probably the same. See this subject discussed below, pp. 277, *sqq.*
(a) *Perry v. Jackson*, (1792) 4 T. R. 516.

Canadian Notes to Chapter VI.

DISCHARGE OF TORTS.

WAIVER BY ELECTION (a).

Ontario. Issuing a *fi. fa.* may be taken as a waiver of the remedy against the sheriff for escape (b).

For a case illustrating the old forms of pleading, see *Hatch v. Holland* (c).

ACCORD WITH THIRD PARTY (d).

Ontario. Where the action was against an attorney for negligence in not registering a mortgage from D. to plaintiff, and plaintiff accepted from D. a mortgage for the same amount on other land, held that it was no objection that the accord was by a third person, a stranger to the action (e).

GOOD CONSIDERATION FOR ACCORD (f).

Ontario. An agreement to support the child is a good consideration to support an accord and satisfaction of an action for seduction (g).

Nova Scotia. Where the parties to an action (and counterclaim) agreed in writing that plaintiff should accept \$240 in settlement of all matters of difference, and the defendant tendered the amount next day, but the plaintiff repudiated the arrangement considering it was merely an offer on his part which he had a right to withdraw, held that the defendant should succeed, as there was good consideration (h).

(a) P. 164, *supra*.

(b) See *Hoskin v. Rabidon*, 1 Ch. Ch. 133.

(c) 28 U. C. R. 213, trespass or trover.

(d) See p. 164, *supra*.

(e) *Lynch v. Wilson*, 22 U. C. R. 226.

(f) P. 166, *supra*.

(g) *McHugh v. Crear*, 18 U. C. C. P. 448.

(h) *Forsyth v. Moulton*, 25 N. S. R. 309.

ACCORD BY ARBITRATION (a) OR REFERENCE.

Where there was a reference after action and 5s. was paid in pursuance of the award, it was held a good plea of accord and satisfaction (b). Ontario.

RELEASE OR RECEIPT (c).

Payment to a person injured in a railway accident and a receipt signed by him may constitute an accord and satisfaction (d). A release or settlement of pending action agreed to by an illiterate plaintiff, without communication with her solicitor and without fair disclosure of facts, cannot stand, and its validity may be tried in the pending action if pleaded in bar (e). Ontario.

ESTOPPEL BY RECORD: JUDGMENT (f).

The English rule has been followed in Ontario (g). The judgment must have been obtained on its merits, not on a technicality (h). Nor is a party prevented from raising a contention that was argued in a previous suit but not pleaded or tried (i). Ontario.

The identity of the facts in a case with those in the former action (where the defence is *res judicata*) is matter for the jury (k).

NO ESTOPPEL BY JUDGMENT OF INFERIOR COURT (l).

The judgment of an inferior Court is not conclusive (m).

New
Brunswick.

FOREIGN JUDGMENT (n).

A judgment of a foreign Court having the force of *res judicata* in the foreign country has the like force in Canada. Unless prevented by rules of pleading, a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained (o). Canada.

(a) P. 166, *supra*.

(b) *Hall v. Warner*, 2 U. C. R. 392.

(c) See pp. 167, 169, *supra*.

(d) *Haint v. Grand Trunk R. W. Co.*, 22 A. R. 504, reversing 26 O. R. 19.

(e) *Johnson v. Grand Trunk R. W. Co.*, 25 O. R. 64; 21 A. R. 408; cf. *Doyle v. Diamond Flint Glass Co.*, 10 O. L. R. 567 (1905).

(f) P. 167, *supra*.

(g) See *Davidson v. Belleville and North Hastings R. W. Co.*, 5 A. R. 315, citing *Nelson v. Couch*, 15 C. B. N. S.

108.

(h) *Adamson v. Adamson*, 28 Gr. 221; *Baker v. Booth*, 2 O. S. 373.

(i) *Flatt v. Waddell, Townsend v. Waddell*, 18 O. R. 539.

(k) *In re Cowan v. Affie*, 24 O. R. 358.

(l) P. 167, *supra*.

(m) See *Jack v. Bonnell*, 35 N. B. R. 323 (1901), action against bail.

(n) P. 167, *supra*.

(o) *Law v. Hansen*, 25 S. C. R. 69; *The Delta*, 1 P. D. 393, distinguished.

Manitoba.

A foreign judgment is a simple contract debt (a). For purposes of procedure it is also a liquidated demand (b). To found an action on, it must be a final judgment, not an interlocutory order (c). The pendency of an appeal does not prevent it being a final judgment (d).

Ontario.

The Judicature Act has not affected the right of a plaintiff in the event of his failing to prove a foreign judgment to recover on the original cause of action (e).

CONVICTION OR ACQUITTAL BEFORE MAGISTRATE (f).

Canada.

The Criminal Code of Canada, s. 866, releases a person who has obtained a certificate of dismissal of complaint for assault, or who has paid the penalty, "from all further or other proceedings civil or criminal for the same cause" (g).

To make this section applicable the trial must be under the summary procedure (h); the complaint must have been laid by the person aggrieved (i); and where a fine has been imposed the fine must have been paid (k).

A conviction or dismissal under Part LV. of the Criminal Code is by s. 799 a bar to "further or other criminal proceedings for the same cause," but is not a bar to civil proceedings (l).

SUCCESSIVE DAMAGES: STATUTES OF LIMITATION (m).

In an action for a personal injury, when there is but one cause of action, damages must be assessed once for all, and when once recovered no new action will lie. The reservation in a judgment of recourse for future damages will not preserve a right of action beyond the period fixed by Statutes of Limitation (n).

(a) *Martel v. Dubord*, 3 M. L. R. 598.

(b) *Whitla v. McCuaig*, 7 M. L. R. 454.

(c) *Graham v. Harrison*, 6 M. L. R. 647.

(d) *Howland v. Codd*, 9 M. L. R. 435. As to defences that may be pleaded against foreign judgment, see *International Corporation v. Great N.-W. Central R. W. Co.*, 9 M. L. R. 147; *British Linen Co. v. McEwan*, 8 M. L. R. 99; 6 M. L. R. 292; *Gault v. McNabb*, 1 M. L. R. 35.

(e) *Clergue v. Humphrey*, 31 S. C. R. 66 (1900).

(f) Pp. 174, 175, *supra*.

(g) This section held *intra vires*. *Flick v. Brisbin*, 26 O. R. 423 (1895); see also *Emerson v. Niagara Navigation*

Co., 3 C. L. T. 207; *Wilson v. Codyre*, 26 N. B. R. 516.

(h) Part LVIII.; see *Clermont v. Lagace*, 2 Can. C. C. 1 (1897).

(i) *Ross v. McQuarrie*, 26 N. S. R. 504 (1894).

(k) *Abinovitch v. Legault*, R. J. Q. 8 S. C. 525 (1895); see *Hardigan v. Graham*, R. J. Q. 12 S. C. 177.

(l) *Neville v. Ballard*, 28 O. R. 588 (1897); *Miller v. Lea*, 25 Ont. A. R. 428 (1898); *Grantillo v. Cuporici*, R. J. Q. 16 S. C. 44 (1899); *Peltier v. Martin*, R. J. Q. 12 S. C. 438; *Clarke v. Rutherford*, 2 O. L. R. 206 (1901).

(m) Pp. 168, 176, *supra*.

(n) *City of Montreal v. McGee*, 30 S. C. R. 582 (1900): cf. *Ferns v. Racicot*, 21 Occ. N. 81.

CONTINUING WRONGS (*a*).

Criminal conversation is a continuing wrong (*b*).

Ontario.

The doctrine of continuing wrong (such as would prevent the statute running) does not apply to injuries to property when the resulting damage could be foreseen and claimed for at the time of the act complained of (*c*).

Where the nuisance was caused by the overflowing of plaintiff's land owing to a dam erected more than six years, the statute was held not to bar an action, but only to limit the recovery of damages to the last six years (*d*).

New Brunswick.

SOME STATUTORY LIMITATIONS RELATING TO TORTS.

The Criminal Code, s. 975, requires that an action against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law shall be commenced within six months after the act committed (*e*).

Canada.

3 Edw. VII. c. 58 (Canada), the Railway Act (1903), s. 242, requires actions for indemnity for any damages to be brought within one year (provision for continuing damages) (*f*).

R. S. O. 1897, c. 72 (Limitations of Action (*g*), s. 1 (1) (*e*), for an escape within six years; (*g*) for penalties, two years (amended by 4 Edw. VII. c. 10, *q. r.*); s. 4, non-resident plaintiffs (*h*); ss. 5, 6, 7, non-resident defendants.

Ontario.

R. S. O. 1897, c. 111, s. 2, English Statutes of Limitations as of Jan. 17th, 1822, continued in force except as otherwise provided.

R. S. O. 1897, Vol. 3, c. 324, s. 38, limitations as to slander, assault, trespass (21 Jac. I. c. 16, s. 13); s. 39, infants may bring action after disability (21 Jac. I. c. 16, s. 7); s. 40, defendants out of Ontario (4 & 5 Anne, c. 3) (*i*); ss. 41—44, limitations of actions by the Crown (2 Edw. VII. c. 1, s. 7).

R. S. O. 1897, c. 60 (Division Courts), s. 298, actions for anything done in pursuance of this Act, within six months.

R. S. O. 1897, c. 68 (Libel and Slander), s. 13, action against newspaper within three months.

(*a*) P. 179, *supra*.

(*b*) *Bailey v. King*, 27 A. R. 703.

(*c*) *Kerr v. Atlantic and North-West R. W. Co.*, 25 S. C. R. 197.

(*d*) *Connors v. McLaggan*, 2 Kerr, 446.

(*e*) See ss. 976—980 for notice of action, &c.

(*f*) See *McEwen v. The N.-W. Coal and Navigation Co.*, 1 Terr. L. R. 203 (1889), objection that an amended statement of claim set up a new cause of

action barred by limitation in Railway Act.

(*g*) See also c. 133 (Real Property Limitation Act).

(*h*) See *Low v. Morrison*, 14 Gr. 192, the effect of c. 72 (25 Vict. c. 20) is to abolish all exceptions and distinctions in favour of absentees.

(*i*) See *Stewart v. Guibord*, 6 O. L. R. 262 (1903).

Ontario.

R. S. O. 1897, c. 85 (Damage to Lands by Flooding), s. 16, action within six months, &c.; s. 17, Statute of Limitations may be set up.

R. S. O. 1897, c. 88 (Protection of Justices of Peace, &c.), s. 13, action against justice of peace to be begun within six months of act complained of.

R. S. O. 1897, c. 99 (Constables), s. 44, actions against constables to be begun within six months.

R. S. O. 1897, c. 143 (Saw Logs Driving Act), s. 27, claims to be made under s. 17 within one year.

R. S. O. 1897, c. 160 (Workmen's Compensation Act), s. 9, actions within six months of accident or twelve months of death.

R. S. O. 1897, c. 166 (Compensation to Families), s. 6, actions under Lord Campbell's Act within twelve months after death of deceased.

R. S. O. 1897, c. 176 (Ontario Medical Act), s. 41, actions against physicians and surgeons for negligence or malpractice within one year (a).

R. S. O. 1897, c. 193 (General Road Companies Act), s. 139, action for anything done in pursuance of Act within six months (b).

R. S. O. 1897, c. 207 (Railways), s. 42, actions for indemnity for damages or injury sustained by reason of the railway, within six months, &c. (c).

R. S. O. 1897, c. 209 (Electric Railways), s. 84, actions for indemnity, &c., within twelve months (d).

R. S. O. 1897, c. 230 (Public Meetings), s. 14, action for anything done under authority of this Act, within twelve months.

R. S. O. 1897, c. 233 (Public Parks), s. 21, action for anything done in pursuance of Act, within six months, or in case of continuation of damages, one year.

R. S. O. 1897, c. 266 (Railway Accidents Act), s. 9, within six months from accident, or twelve months from death.

R. S. O. 1897, c. 318 (Private Lunatic Asylums), s. 89, action against any person for anything done in pursuance of Act, within twelve months next after release.

3 Edw. VII. c. 19 (Municipal Act), s. 606, actions against municipality for negligence in repairing highways, &c., within three months.

Alberta and
Saskatche-
wan.

C. O. N. W. T. See c. 31 (Limitations of Actions).

C. O. N. W. T. See c. 9 (Public Works), s. 41, claim to be filed within six months.

(a) See *Miller v. Ryerson*, 22 O. R. 369.

(b) See *Webb v. Barton*, 26 O. R. 343.

(c) See *Ryckman v. The Hamilton, Grimsby, and Beamsville Electric R. W. Co.*, 10 O. L. R. 419 (1905), as to common law right outside of statute.

(d) It is worth noticing that a road operated by electricity may by its special charter come within s. 42 of the Railway Act rather than s. 84 of the Electric Railway Act—e.g., the Toronto Railway Company—55 Vict. c. 99, s. 18.

C. O. N. W. T. See c. 21 (Judicature), s. 536, actions against public officers within six months. **Alberta and Saskatchewan.**

C. O. N. W. T. See c. 48 (Compensation to Families—Lord Campbell's Act), s. 4, action within twelve months after death.

C. O. N. W. T. See c. 70 (Municipal), s. 87, actions for non-repair, &c., within six months.

R. S. B. C. 1897, c. 123 (Statute of Limitations), Part I., Personal Actions; Part II., as to Real Property; Part III., Specialty Debts; Part IV., Foreign Statutes of Limitations. **British Columbia.**

R. S. B. C. 1897, c. 1 (Interpretation), s. 10 (28), actions for penalties or forfeitures under provincial Acts within six months.

R. S. B. C. 1897, c. 40 (Cattle Act), s. 29, actions against justices of peace for anything done under Act within six months.

R. S. B. C. 1897, c. 52 (County Courts Act), s. 213, actions against persons doing anything in pursuance of Act within three months.

R. S. B. C. 1897, c. 58 (Families Compensation Act—Lord Campbell's Act), s. 5, action within twelve months after death.

R. S. B. C. 1897, c. 69 (Employers' Liability), s. 9, action within six months of accident, twelve months of death.

R. S. B. C. 1897, c. 84 (Bush Fire Act), s. 11, action for contravention of Act within three months.

R. S. B. C. 1897, c. 127 (Magistrates Act), s. 13, action against magistrate. See also c. 128, s. 9.

R. S. B. C. 1897, c. 144 (Municipal Clauses Act), s. 243 (amended 1900 by 64 Vict. c. 23 (B. C.), s. 32), actions against municipality within six months (*a*).

R. S. B. C. 1897, c. 163 (British Columbia Railway Act), s. 42, actions for indemnity within one year—proviso for continuing damage (*b*).

R. S. B. C. 1897, c. 185 (Tramway Company Incorporation Act), s. 15 (see 1900, 64 Vict. c. 40, s. 5) incorporates s. 42 of Railway Act.

R. S. M. 1902, c. 31 (Compensation to Families—Lord Campbell's Act), s. 5, action within twelve months after death. **Manitoba.**

R. S. M. 1902, c. 40 (King's Bench Act), s. 38 (m) (amended 1905, c. 4), s. 1, limitations on foreign judgments and causes of action.

R. S. M. 1902, c. 52 (Elections), s. 180, action for damages for delay in declaring election within one year, &c.

R. S. M. 1902, c. 104 (Manitoba Magistrates Act). See ss. 34—36.

R. S. M. 1902, c. 111 (Medical Profession), s. 68, actions for negligence or malpractice within one year.

R. S. M. 1902, c. 116 (Municipal Act), s. 667 (b), action for

(*a*) See *The Queen v. Municipal Council of Corporation of the District of Mission*. 7 B. C. R. 513.

(*b*) See *Sayers v. British Columbia Electric R. W. Co.*, 3 West L. R. 44 (1906).

Manitoba. damages for non-repair of highway, &c., within three months from notice; s. 676, claims for compensation for opening road within two years.

R. S. M. 1902, c. 140 (Public Officers), s. 38, action against surety within ten years.

R. S. M. 1902, c. 141 (Public Parks), s. 65, action for anything done in pursuance of Act within six months, &c.

R. S. M. 1902, c. 144 (Public Works), s. 48, claims for compensation to be filed within six months.

R. S. M. 1902, c. 145 (Manitoba Railway Act), s. 116, suits for indemnity, &c., within six months.

R. S. M. 1902, c. 146 (Railway Commissioners Act), s. 67, claims for indemnity within six months.

R. S. M. 1902, c. 148 (The Real Property Act), s. 150, no action against district registrar for deprivation of property except commenced within ten years—proviso for disability.

R. S. M. 1902, c. 170 (Trustees, Executors, &c.), s. 57, by executors for injury within six months prior to death, if action brought within one year after death; s. 58, against executors for injury within six months prior to death if action brought within six months after death.

R. S. M. 1902, c. 178 (Workmen's Compensation), s. 13, action within two years.

New Brunswick. C. S. N. B. 1903, c. 138 (Limitation of Personal Actions) (a). This is the general Act.

C. S. N. B. 1903, c. 22 (Liquor Licences), s. 91, action against inspector *et al.* within three months.

C. S. N. B. 1903, c. 36 (Public Parks), s. 18, action for anything done in pursuance of Act within six months.

C. S. N. B. 1903, c. 50 (The Schools Act), s. 80, actions against trustees within three months.

C. S. N. B. 1903, c. 64 (Protection of Constables), s. 4, action within six months.

C. S. N. B. 1903, c. 65 (Protection of Justices), s. 9, action within six months.

C. S. N. B. 1903, c. 79 (Compensation to Relatives—Lord Campbell's Act), s. 5, action within twelve months after death.

C. S. N. B. 1903, c. 88 (Streams Improvement Act), s. 49, action for matters done in pursuance of Act within six months.

C. S. N. B. 1903, c. 91 (The New Brunswick Railway Act), s. 30, actions for indemnity for damage, within one year—proviso for continuing damage.

C. S. N. B. 1903, c. 162 (Trustees), s. 50, pleading Statute of Limitations.

C. S. N. B. 1903, c. 163 (Executors and Trustees), s. 1, action

(a) See also c. 139, as to Real Property.

for injuries to real estate of deceased committed within six months of death if action begun within one year of death. **New Brunswick.**

C. S. N. B. 1908, c. 165 (Municipalities), s. 104, action against municipal officer within three months.

C. S. N. B. 1908, c. 166 (Towns Incorporation Act), s. 97, action against person for anything done by virtue of office under this Act to be brought within three months.

R. S. N. S. 1900, c. 167 (The Statute of Limitations).

**Nova
Scotia.**

R. S. N. S. 1900, c. 19 (Coal Mines Regulation Act), s. 60, action within six months.

R. S. N. S. 1900, c. 20 (Metalliferous Mines Regulation Act), s. 29, action within six months.

R. S. N. S. 1900, c. 40 (Protection of Justices of the Peace, &c.), s. 11, action to be brought within six months next after act committed.

R. S. N. S. 1900, c. 42 (The Constables Protection Act), s. 5, action within six months.

R. S. N. S. 1900, c. 70 (The Municipal Act), s. 147, action *ex delicto* against corporation within six months.

R. S. N. S. 1900, c. 71 (The Towns Incorporation Act), s. 274, action *ex delicto* against town within twelve months (a).

R. S. N. S. 1900, c. 79 (Commissioners of Streets), s. 58, action against commissioner or surveyor within six months.

R. S. N. S. 1900, c. 99 (The Nova Scotia Railways Act), s. 278, action within one year—proviso in case of continuing damage (b).

R. S. N. S. 1900, c. 177 (Actions by and against Executors), s. 1, may bring action for damages to real property of deceased committed within six months previous to death, if action within one year of death; s. 2, similar action *against* executors for injury to real or personal property by deceased within six months previous to death, if action brought within six months after death.

R. S. N. S. 1900, c. 178 (Compensation to Relatives—Lord Campbell's Act), s. 10, action within twelve months after death.

R. S. N. S. 1900, c. 179 (Employers' Liability Act), s. 8, action within six months of accident or twelve months of death.

For Statutes of Limitations in effect in the Yukon, see *United States Saving and Loan Co. v. Rutledge* (c). **Yukon Territory.**

(a) An action in reference to a continuing nuisance is not barred by this section except as to damage suffered more than one year before action brought: *Archibald v. Town of Truro*, 33 N. S. R. 401; 31 S. C. R. 380.

tween two stations, and defendants' servants injured the machine in putting it on board the car, held not within this section: *Whitman v. The Western Counties Railway Co.*, 17 N. S. R. (5 R. & G.) 405.

(b) Where plaintiff delivered to defendants a machine to be carried be-

(c) 2 West L. R. 471, (1905) Macaulay, J.

Implied
consent.

touch him (a). With regard to those cases where the act is done on purpose, it is frequently said that in order to constitute a battery there must be a hostile intent. "The least touching of another in anger is a battery" (b). If a tap be given on the shoulder for the purpose of effecting an arrest, and the arrest be unlawful, the mere tap constitutes a battery (c). "If two or more meet in a narrow passage, and without any violence or design of harm, one touches the other gently, it will be no battery." But "if any of them use violence against the other to force his way in a rude and inordinate manner it will be a battery, or any struggle about the passage to that degree as may do hurt will be a battery" (d). "If one strike another upon the hand or arm, or breast in discourse, it is no assault, there being no intention to assault" (e). On principle, however, it would seem that the true test is not whether a hostile intent on the part of the defendant, but whether an absence of consent on the part of the plaintiff, can be inferred (f). Thus it is a battery for a medical practitioner to vaccinate a person against his will. If one man goes on to the land of his neighbour in a reasonable and peaceable manner for the purpose of speaking to him, it is no trespass, because, although there is no express permission,

(a) *Weaver v. Ward*, (1616) Hob. 134; see *Leame v. Bray*, (1803) 3 East, 593. See above, pp. 8, 9.

(b) *Per Holt, C.J., Cole v. Turner*, (1704) 6 Mod. p. 149.

(c) *Rawling v. Till*, (1837) 3 M. & W. 28.

(d) *Per Holt, C.J., Cole v. Turner*, (1704) 6 Mod. p. 149.

(e) *Per Cur. Tuberville v. Savage*, (1669) 1 Mod. p. 3.

(f) There is perhaps no great practical difference between the two ways of stating the law, but the distinction may be material. In *Coward v. Baddeley*, (1859) 4 H. & N. 478, the plaintiff sued for an assault and false imprisonment. The defendant justified on the ground that he had been assaulted by the plaintiff. The facts were that the defendant had been engaged in extinguishing a fire, and the plaintiff came up and told him he was managing the hose im-

properly. The defendant told the plaintiff to mind his own business. The plaintiff then put his hands on the defendant's shoulder and turned him round, pointing out all the while how the hose ought to be managed. The defendant thereupon gave the plaintiff into custody for an assault. The jury were directed that the defendant was not justified unless the plaintiff had acted with hostile intent, and this direction was held correct. But the Court, though holding that in the absence of intent there could be no criminal assault such as to justify an arrest, seem to have doubted whether under the circumstances the plaintiff might not have been liable to an action of battery: obviously because the defendant could not have been said under the circumstances to have impliedly assented to the manner in which the plaintiff laid hands on him.

yet leave and licence may be inferred. In the same way, it may be said, that if one man touches another for the purpose of calling his attention, there is an implied assent to the act which makes it no battery.

It is to be observed, however, that under the old forms of pleading a distinction with regard to the defence of consent was made between a trespass to the person and other kinds of trespass. A defendant in trespass to land or goods who relied upon this defence had to confess and avoid by a plea of leave and licence; but in trespass to the person he might prove his case under the plea of not guilty, inasmuch as it was considered a contradiction in terms to speak of an assault by consent (a).

It has been doubted whether the maxim of *volenti non fit injuria* applies to all cases of trespass to the person. If two men fight together by agreement for a prize or otherwise and without any animosity against each other, simply for the purpose of testing which is the better boxer, they are clearly both consenting parties to the injuries which they mutually inflict on each other. Nevertheless, their conduct may amount to a breach of the peace, and if so, they may be convicted of an assault (b). This is quite in accordance with the general principles of the criminal law, for the gist of the matter being the injury to the public peace, the consent of the parties is immaterial. It has further been ruled at *nisi prius* that for an action founded on a battery criminal in its nature, the defence of consent is not available (c). And the same opinion is expressed in *Reg. v. Coney*. "The true view is, I think, that a blow struck in anger or which is likely or intended to do corporal hurt is an assault, but that a blow struck in sport and not likely nor intended to cause bodily harm is not an assault, and that an assault being a breach of the peace and unlawful the consent of the person struck is immaterial" (d). It is not, however, in every case that a criminal offence causing damage to another is a ground of action. Thus, a forcible entry is an indictable offence, but if the party so entering has the right

How far
consent a
defence.

(a) *Christopherson v. Bare*, (1848) 11 Q. B. 473. N. P. p. 16. See, too, *Matthew v. Oller-ton*, (1693) Comb. 218.

(b) *Reg. v. Coney*, (1882) 8 Q. B. D. 3. (d) *Per Cave, J.*, (1882) 8 Q. B. D. p. 539. See, however, *per Hawkins, J.*, *ibid.* p. 553.

(c) *Boulter v. Clerk*, (1747) Buller,

of possession he is not, it would seem, civilly responsible (a). Nor in the case under consideration does there seem any reason why the plaintiff should be in a better position because he was a party to the crime. If two men are guilty of indecent conduct towards each other they commit a misdemeanor, but it would seem strange to allow them for such conduct reciprocally to bring actions.

A summary conviction for assault is, however, no bar to the person convicted subsequently instituting a civil action for damages against the prosecutor for an alleged antecedent assault by him (b).

Consent
induced by
fraud.

A consent induced by the fraud of the person doing the act is a mere nullity, where the misapprehension of the consenting party goes to the root of the whole transaction, and alters the whole nature and quality of the act done. Thus, where a girl allowed a man to have carnal knowledge of her under the belief that she was submitting to a surgical operation, it was held that he was guilty of a rape (c). It has, however, been held by Ridley, J., in the more recent case of *Reg. v. O'Shay* (d), that if a woman, even though induced by fraudulent misrepresentation, gives conscious permission to the act of connection, the offence does not amount to rape. And a mere mistake as to the effect and consequences of the act done does not annul the assent so as to make the act an assault. If one man administers a poison to another who takes it in ignorance of its noxious character, this is no trespass at common law, although he may be found guilty of a graver charge. The same rule applies where contagion is conveyed by physical contact. If there is consent to the contact the remedy for the wrong, however great, cannot be obtained in this form of action (e).

Assault.

2. An assault may be defined as an attempted battery. That is to say, there must be an overt act indicating an intention to commit a battery, coupled with the capacity of carrying that

(a) See *per* Parke, B., *Harvey v. Brydges*, (1845) 14 M. & W. p. 442.

See below, pp. 333-335.

(b) *Wilson v. Bennett*, (1904) 6 F. 269, Ct. of Sess.

(c) *R. v. Flattery*, (1877) 2 Q. B. D.

410.

(d) (1898) 19 Cox, C. C. 76.

(e) *R. v. Clarence*, (1888) 22 Q. B. D. 23, at p. 42. See *Hegarty v. Shine*. (1878) 14 Cox, C. C. 124, 145.

intention into effect (a). There are obvious reasons why in dealing with security of the person the law should treat the mere attempt as a substantive wrong. "If you direct a weapon, or if you raise your fist, within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault, 'I will commit an assault,' I think that is not an assault" (b). It is an assault to present a gun in a hostile manner within shooting distance, although it may be at half-cock, because the cocking is a momentary operation (c). There may be an assault although the defendant is not within striking distance, as, for instance, if he makes a rush at the plaintiff but is stopped before he is near enough to deal a blow (d). In *Martin v. Shoppee* (e), the defendant pursued the plaintiff with an uplifted whip intending to strike him, but the latter made his escape, and it was held an assault. A mere gesture, however menacing, is not actionable if it appear at the time that there is no intention to put the menace into immediate effect. In *Tuberville v. Savage* (f), the defendant put his hand to his sword and said, "If it were not assize time I would not take such language from you." It was held to be no assault.

3. A false imprisonment is complete deprivation of liberty for the time being without lawful cause. The prisoner may be confined within a definite space by being put under lock and key, or his movements may simply be constrained by the will of another. The constraint may be actual physical force, or merely the apprehension of such force, or it may be submission to a legal process (g). But merely giving a person in charge, without actual arrest, is not an imprisonment which will support an action (h). If a writ or warrant for a man's apprehension is exhibited to him, and he thereupon for the time submits himself to the orders of the officer executing it, he becomes a prisoner though

False imprisonment.

(a) *Read v. Coker*, (1853) 13 C. B. P. 349.
850.

(b) *Per Pollock, C.B., Cobbett v. Grey*,
(1849-50) 4 Ex. p. 744.

(c) *Per Willes, J., Osborn v. Veitch*,
(1858) 1 F. & F. p. 318.

(d) *Stephens v. Myers*, (1830) 4 C. &

(e) (1828) 3 C. & P. 373.

(f) (1669) 1 Mod. 3.

(g) *Warner v. Riddiford*, (1858) 4
C. B. N. S. 180.

(h) *Simpson v. Hill*, (1795) 1 Esp. 431.

his person be never touched (a). In *Arrowsmith v. Le Mesurier* (b), a constable was entrusted with a warrant for the apprehension of the plaintiff. He showed the warrant, and the plaintiff afterwards accompanied him before a magistrate. It was held that there had been no intention to apprehend on the one hand or submission to arrest on the other, that the warrant had been simply used as a summons to indicate to the plaintiff that he was required to appear to the charge, and that consequently there had been no arrest. In *Berry v. Adamson* (c), the plaintiff sued for a malicious arrest. A writ had been placed in the hands of a sheriff's officer, who gave him notice of it and asked him to attend and give a bail bond, which the plaintiff did. He was non-suited on the ground that this did not amount to an arrest. A mere partial interference with freedom of locomotion does not amount to an imprisonment. If a road is blocked so that a man is thereby prevented from exercising a right of way and he is compelled to return on his steps, it cannot be said that he has thereby been made a prisoner (d).

Continuance
of imprison-
ment.

Any one, including a corporation (e), who either initiates or helps to continue a wrongful detention, is guilty of false imprisonment, though he be not responsible for the original wrong (f). If a prisoner in lawful custody acquires a right to his discharge, the failure of the person who has him in charge to let him go constitutes a false imprisonment (g).

Imprison-
ment in un-
authorised
place.

If there is authority to confine a prisoner in one place and he be confined in another, this is a wrongful confinement. In *Cobbett v. Grey* (h), the plaintiff being in custody as an insolvent, had been improperly removed to a wrong part of the prison and confined among a wrong class of prisoners. The majority of the Court held that this was a trespass. Pollock, C.B., however, dissented on the ground that the governor of the jail had general

(a) *Grainger v. Hill*, (1838) 4 Bing. N. C. 212.

(b) (1806) 2 B. & P. N. R. 211.

(c) (1827) 6 B. & C. 528.

(d) *Bird v. Jones*, (1845) 7 Q. B. 742.

(e) *Cornford v. Carlton Bank, Ltd.*, (1900) 1 Q. B. 22.

(f) *Griffin v. Coleman*, (1859) 4 H. & N. 265. Except where in the course of

duty he acts under a warrant good on the face of it. See Ch. XXII.

(g) *Wythers v. Henley*, (1614) Cro. Jac. 379. See *Migotti v. Culvill*, (1879) 4 C. P. D. 233; *Mee v. Cruikshank*, (1902) 86 L. T. 708.

(h) (1849-50) 4 Ex. 729; see Bac. Ab. Trespass, D. 3.

authority to confine him within the walls of the prison, and that if he had neglected the rules with regard to the classification of prisoners, this was a breach of his official duty for which he might be responsible to his superiors, but not in an action of trespass at the suit of each prisoner aggrieved.

The question of responsibility of a defendant for a trespass in which he has not personally participated, but which is alleged to have been committed by his authority, is dealt with elsewhere in the chapter on Parties. There is, however, a special kind of agency which it is convenient here to consider. An act amounting to a trespass may have been committed through the instrumentality of some officer or minister of the law, and it may be sought in consequence to charge some party as principal, because he initiated the proceedings under which the alleged wrong was inflicted.

Agency of an officer of the law.

Legal proceedings may be either ministerial or judicial. In case of the former, the party employs the machinery of the law entirely at his own risk, and is directly responsible for the consequences. In case of the latter, he appeals to the discretion of some judge or magistrate, and the steps thereupon taken result immediately from the exercise of that discretion and not from the act of the party (*a*). Under such circumstances a man may indeed be liable in an action of malicious prosecution if he has wrongfully set the law in motion, but he cannot be sued in an action of trespass, which is only the remedy for a direct and immediate wrong.

Ministerial and judicial proceedings.

If a party is arrested without a warrant and taken before a magistrate, who thereupon remands him, he must seek his remedy for the first imprisonment in an action of trespass, for the imprisonment on remand in an action for malicious prosecution (*b*).

The distinction between a ministerial and judicial act is illustrated by the case of *Brown v. Chapman* (*c*). The plaintiff had gone before a magistrate voluntarily to meet any charge which the defendant might bring against him. The magistrate declined to deal with the case unless a definite charge was made. The

(*a*) *Austin v. Dowling*, (1870) L. R. 5 C. P. 534.

(*b*) *Lock v. Ashton*, (1848) 12 Q. B. 871.

(*c*) (1848) 6 C. B. 365.

defendant said that the plaintiff had been embezzling. The magistrate said, "Do you give him into custody?" The defendant replied, "I do give him into custody." It was held that he was not liable in an action of trespass, because the imprisonment was the judicial act of the magistrate. "The particular expression," said the Court, "which alone can properly be argued to be evidence of an authority given by the defendant for the imprisonment of the plaintiff was addressed to the magistrate, and no other person could properly act upon it; and we think that such an expression used by a party to a magistrate in the course of preferring a charge cannot be considered as constituting the magistrate the agent of the suitor or as calling upon him to act ministerially upon the authority of such suitor" (a). On the same principle, if the authorities of a foreign State acting on their own judgment corporally punish a man, no action of trespass lies against the instigator of the proceedings, however wrong or malicious his conduct may have been. In *Raphael v. Verelst* (b), however, where the plaintiff had been imprisoned by a sovereign Indian prince, who, as the jury found, "was under the awe and influence of the defendant and acted contrary to his own inclination, being fearful of offending him," it was held that, the prince having acted merely as agent of the defendant, the latter was answerable in trespass. In *Aitken v. Bedwell* (c) the plaintiff had been handed over by his captain, the defendant, in a Russian port to the authorities on a charge of misconduct. After some days he was brought out and flogged by Russian soldiers, the defendant standing by and ordering the punishment. It was left to the jury to say "whether the punishment was done by the constituted authorities on the mere complaint of the defendant, or whether the defendant was the actor and immediate promoter."

Arrests by
ministerial
officers.

If the arrest or other trespass is effected by a purely ministerial officer and not under the authority of any Court, the defendant must clearly be answerable if he in fact authorised the act in question. It is not necessary that he should in terms have made a request or demand; it is enough if he makes a charge on which

(a) 6 C. B. p. 376.

(b) (1776) 2 W. Bl. 1055.

(c) (1827) 1 M. & M. 68.

it becomes the duty of the constable to act (a). But it is quite a different thing if a party simply gives information, and the constable thereupon acts according to his own judgment, and in such a case the informer incurs no responsibility (b).

If a person signs the charge-sheet after an arrest has been made he thereby creates strong *prima facie* evidence against himself as having authorised the proceeding (c), but such an act does not make him necessarily responsible for the arrest. Thus where a constable having taken the plaintiff into custody on his own judgment, requested the defendant to sign the charge-sheet, and the defendant did so, it was held that there was no evidence to make him liable for the imprisonment (d); it being essential in order to make a defendant liable, on a charge of malicious prosecution, for the plaintiff to show, not only that the defendant was wrong, but also that he was wilfully and maliciously so (e).

There is not only a distinction between the act of a ministerial officer such as a policeman and the act of a judicial officer such as a magistrate, but there is a distinction between the ministerial and judicial acts of Courts of justice. That is strictly speaking a judicial act which follows in the ordinary course of procedure from an order given by a judicial officer in the exercise of his functions. For such an act there is no remedy in trespass against the party initiating the proceedings. Even though the Court should act altogether outside its competence, yet still the party is protected, for he has a right to state his case and leave it to the Court to decide whether it has jurisdiction or not (f). It would probably, however, be otherwise if to the knowledge of the party the pro-

Judicial acts.

(a) *Hopkins v. Crowe*, (1836) 4 A. & R. 774.

(b) *Gooden v. Elphick*, (1849) 4 Ex. 445. In *Flewster v. Royle*, (1808) 1 Camp. 187, the defendant was held answerable in trespass for the wrongful seizure of the plaintiff by a pressgang in consequence of false information given by the defendant. This case was explained in *Gooden v. Elphick*, as having probably proceeded on the ground of the defendant's malice. Malice, however, could not well be the gist of an action of trespass.

(c) *Harris v. Dignum*, (1860) 29 L. J. Ex. 23.

(d) *Grinham v. Willey*, (1859) 4 H. & N. 496.

(e) *Darling v. Cooper*, (1869) 11 Cox, C. C. 533.

(f) *Carratt v. Morley*, (1841) 1 Q. B. 18; *West v. Smallwood*, (1838) 3 M. & W. 418; *Brown v. Chapman*, (1848) 6 C. B. 365. In case of a conviction under such circumstances proceedings would, however, lie against the justice for acting without jurisdiction (*Polley v. Fordham*, (1904) 2 K. B. 345).

Party
personally
intervening.

ceedings were altogether without colour of right. The absence of jurisdiction, however, makes this difference, that if the party, instead of leaving the orders of the Court to be carried out in the ordinary way by its officers, personally intervenes, as by superintending the execution of process, he then makes himself a trespasser (a). He only incurs this liability by participating in the very act itself; not by merely taking the necessary formal steps in accordance with the procedure of the Court to set its officers in motion (b).

Ministerial
act of Court
of justice.

Many proceedings are taken under the authority of Courts of justice, which are ministerial because they are not the consequence of a decision judicially given. Thus judgment may be given by default on the production of certain formal evidence, and this judgment, though in one sense the act of the Court, is in another sense the act of the party, and he may be directly responsible in trespass for anything done to carry it out. If the order of the Court was altogether without jurisdiction it can serve as no protection whatever (c). If it was within the jurisdiction of the Court, however irregular, it protects all proceedings duly taken in pursuance of it, until it is set aside (d). An order of a Court may be set aside on the ground of error, as a matter of favour, or because it was irregularly obtained. There can only be error where there has been a judicial decision, and as has already been seen, anything done under a judicial decision cannot be a ground of trespass against a party, because it is not his act but the act of the Court. It is obvious that where an order is set aside as a matter of favour, the order is admitted to have been in itself a proper one, and it therefore gives validity to all proceedings taken while it was still in force. But an order obtained without judicial intervention and in an irregular or dishonest manner, when once set aside, is, so far as concerns the person thus obtaining it, as though it had never been made. It is for the party who seeks thus to deprive his adversary of the protection of the order

Setting aside
proceedings.

(a) *Palmer v. Liverpool Gas Co.* 1836 3 A. & E. 433. See *West v. Smithwood*, *supra*, p. 195. As to the cases where the party simply "acts in aid," see below, p. 210.

(b) *Coleman v. Hardie*, (1845) 7 Q. B.

928.

(c) *Brooke v. Hodgkinson*, (1859) 4 H. & N. 712.

(d) *Riddell v. Pakenham*, (1835) 2 C. M. & R. 30.

to show on what ground it was annulled (*a*). Thus where a warrant of attorney had been given as an escrow, and nevertheless it was put in force and judgment entered up; where after proceedings had been commenced for the recovery of a debt it was paid, and nevertheless judgment was signed; where execution was issued against an executrix personally for her testator's debt; in all these cases the proceedings having been set aside, it was held that trespass lay in respect of the acts done under them (*b*). In *Williams v. Smith* (*c*), an attachment was obtained against the plaintiff on an affidavit of his disobedience to an order of the Court. He had given an excuse for his conduct to the defendant, which was afterwards held good, and the attachment was set aside. The defendant not thinking the excuse to be material, had made no mention of it in his affidavit. It was held that no action of false imprisonment lay against him.

Both the party and his solicitor are answerable for what is done under a process improperly taken out and subsequently avoided (*d*).

Responsi-
bility of
solicitor.

It is not in every case that irregular proceedings will be set aside. Thus where an execution has been taken out contrary to good faith for a sum greater than is really due, it is allowed to stand if in accordance with the judgment, but the injured party may have his remedy in an action on the case for any special damage caused (*e*). So formerly if a party had been wrongfully arrested on mesne process or after judgment on a *ca. sa.*, he did not apply to set the proceedings aside and recover for the false imprisonment, but alleged the arrest as a damage consequential on proceedings instituted maliciously and without reasonable or probable cause.

Remedy
where
proceedings
cannot be set
aside.

The power of imprisonment in respect of debt, whether before or after judgment, now depends upon the provisions of 32 & 33 Vict. c. 62. It can only be exercised judicially and upon sworn

Imprison-
ment under
judge's order.

(*a*) *Smith v. Sydney*, (1870) L. R. 5 Q. B. 203.

(*b*) *Brown v. Jones*, (1846) 15 M. & W. 191; *Bates v. Pilling*, (1826) 6 B. & C. 38; *Barker v. Braham*, (1773) 3 Wils. 368; see *Parsons v. Lloyd*, (1772) *ibid.* 341.

(*c*) (1863) 14 C. B. N. S. 596.

(*d*) *Bates v. Pilling*, (1826) 6 B. & C. 38; *Barker v. Braham*, (1773) 3 Wils. 368; *Codrington v. Lloyd*, (1839) 8 A. & E. 449; and see *Edwards, Ex parte Chapman, In re*, (1884) 13 Q. B. D. 747.

(*e*) *Gilding v. Eyre*, (1861) 10 C. B. N. S. 592; *Churchill v. Siggers*, (1854) 3 E. & B. 929. See Ch. XIX.

information. Therefore, however wrongfully and fraudulently the judge's order may have been obtained, it is nevertheless a purely judicial act, and consequently an arrest in pursuance of it cannot be a trespass, and the injured party must sue for maliciously and without reasonable and probable cause procuring the order (a).

Party •
personally
intervening.

However, just as a party may make himself liable for what is done under process issued without jurisdiction by officiously intervening in its execution (b), so where the process is within the jurisdiction of the Court, if he takes on himself to give orders or directions to the officer entrusted with its execution, and in consequence of those orders and directions a wrongful act is committed, he will be liable, since he will have made the officer his agent to do that very thing (c). On the other hand, if he simply gives advice or information to the officer or urges him to do that which it is his duty to do, he does not therefore become the author of the subsequent proceedings (d).

What is an
intervention.

It is not always very easy to draw a distinction between what is mere advice and what is a direction. The question is one of fact. In *Morris v. Salberg* (e), the plaintiff's goods had been seized under a writ of *fi. fa.* directed against his son. The solicitor of the defendant, the execution creditor, had indorsed on the writ, "The defendant is a gentleman who resides at Sarnau Park, Llandyssil, Cardigan, in your bailiwick." The address so given was that of the father, and not that of the son. The jury found that the sheriff seized the goods because he was misled by the direction given to him. It was held that the jury had found in effect that the sheriff had acted under the direction of the defendant, that the question was one for them, although it turned in reality on the construction of a written document. The plaintiff accordingly recovered judgment. If the execution creditor positively affirm to the officer of the Court that a certain person is the man, or that certain goods are the property of the man against whom the process issues, that amounts to an authority

(a) For instances of this kind of action, see *Petrie v. Lamont*, (1842) 3 M. & G. 702; *Ross v. Norman*, (1850) 5 Ex. 359. See Ch. XIX.

(b) See above, p. 196.

(c) *Sowell v. Champion*, (1837) 6

A. & E. 407.

(d) *Conshaw v. Chapman*, (1862) 7 H. & N. 911.

(e) (1889) 22 Q. B. D. 614. This case overrules *Childers v. Wooler*, (1859) 2 E. & E. 287.

to the officer, and the creditor is answerable for the consequences of obeying his direction (a).

If no previous authority has been given a party does not become liable by subsequently availing himself of the execution. A man can only ratify where the act has been done at the time in his name. But a ministerial officer of justice purports to act in the name of the Court to which he belongs and not in the name of the suitor (b).

No ratification of unlawful proceedings.

A trespass to the person may be justified on the ground (1) that the defendant was acting in defence of his person or property; (2) that he was stopping a breach of the peace, putting down a riot, or apprehending an offender against the criminal law; (3) that the plaintiff had escaped from lawful custody; (4) that the defendant was acting in aid of officers of the law; (5) that the plaintiff was in such a state as to be dangerous to himself and others; (6) that the defendant was administering reasonable chastisement in the exercise of parental or other authority. In all these cases what is *prima facie* a wrongful act is committed under the authority of the law, and if this authority is abused, it altogether fails as a protection, and the party is liable not merely in respect of the way in which he exceeded his right, but also of all that he did in exercise of the right. He is said to be a trespasser *ab initio*, on the assumption that his subsequent misconduct evidences an intention from the first to commit unlawful acts under the colour of a lawful authority (c). This artificial assumption in many cases does not accord with the real justice of the case. If a schoolmaster unmercifully beats a pupil, it is reasonable enough that he should be made to pay damages as for an entirely unauthorised assault, without taking into account the fact that he was entitled to inflict some punishment. But if a person having taken a horse under distress *damage feasant*, subsequently works it, it would appear more just to exact from him adequate compensation than to make him liable in trespass for the original taking as unlawful *ab initio*.

Justification of trespass.

(a) *Humphrys v. Pratt*, (1831) 5 Bligh. N. R. 154; *Walley v. M'Connel*, (1849) 13 Q. B. 903.

(b) *Wilson v. Tumman*, (1843) 6 M. & G. 236; *Woodlen v. Wright*, (1862) 1

H. & C. 554. As for the responsibility of officers of justice whether judicial or ministerial, see Ch. XXII.

(c) *Six Carpenters' case*, (1610) 8 Rep. 146 a.

If A. being in lawful custody is detained after he has acquired a right to discharge, this, as has already been seen, is treated as a fresh imprisonment, and does not make the prior imprisonment unlawful, for it is said that in such a case unlawful prolongation cannot have been contemplated on the original arrest (a).

Use of force
in defence of
person or
property.
In support of
criminal law.

1. The question of the lawfulness of the use of force in defence of person or property is considered elsewhere (b).

2. The right and duty of using force towards, and apprehending without warrant, persons offending or suspected of offending against the criminal law is given both by common law and statute, in some cases to all members of the public, in others to owners and custodians of property, in others to persons filling certain special positions, and in particular to officers of the peace (c).

In cases of
breaches of
the peace.

Any person may forcibly interpose to stop a breach of the peace while continuing, or to prevent its renewal. He may apprehend any one engaged in breaking the peace, and having done so, it is his duty to hand over the prisoner to a constable or himself to take him before a justice of the peace, who may enquire into the matter and bind over the offender to keep the peace or otherwise deal with him according to the law (d). But the person so interposing is only justified if he himself is the witness of the disturbance; he cannot act on the information of others (e). "It is unquestionable that any bystander may and ought to interfere to part those who make an affray and to stay those who are going to join in it, till the affray be ended. It is also clearly laid down that he may arrest the affrayers and detain them until the heat be over, and then deliver them to a constable. . . . And if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is

(a) *Smith v. Egginton*, (1837) 7 A. & E. 167. See also as to illegal detention subsequent to an originally lawful custody, *Mee v. Cruikshank*, (1902) 86 L. T. 708.

(b) See above, pp. 150-154.

(c) As to this last class of persons, see Ch. XXII.

(d) Larceny Act, 1861, s. 103, and

see *Griffith v. Taylor*, (1876) 2 C. P. D. 194.

(e) A constable on the other hand can act on what he hears (see Ch. XXII.), though at common law he is not entitled to arrest for a mere assault that he has not witnessed (*Crupey v. Henley*, (1797) 2 Esp. 540).

over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is that for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth while those are assembled together who have committed acts of violence and the danger of their renewal continues, the affray itself may be said to continue" (a). But when once the danger is over the right is gone (b). If a man having committed a breach of the peace runs off, he cannot without warrant be apprehended, however fresh the pursuit and immediate the capture.

It is not necessary for a bystander who finds two people fighting together to enquire which was the aggressor. He may arrest either of them if it is reasonably requisite to do so in order to prevent a continuance of the affray (c).

A breach of the peace takes place when either an actual assault is committed on an individual or public alarm and excitement is caused. Mere annoyance or insult to an individual, stopping short of actual personal violence, is not a breach of the peace. Thus a householder—apart from special police legislation—cannot give a man into custody for violently and persistently ringing his door-bell (d). But it is a breach of the peace to collect a number of persons before a man's house and to use violent and abusive language, or otherwise behave in a disorderly manner, because public excitement may be thereby created and a riot ensue (e). It is not a sufficient justification of an arrest to plead that the plaintiff was "in heat and fury ready and desirous to make an affray and commit a breach of the peace," but the plea is good if it allege that his conduct was such as to alarm and disquiet the neighbourhood (f). Mere noise and inter-

What is a
breach of the
peace.

(a) *Per Cur. Timothy v. Simpson*, 123.
(1835) 1 C. M. & R. pp. 762-3.

(b) *Baynes v. Brewster*, (1841) 2 Q. B. 375.

(c) *Timothy v. Simpson*, (1835) 1 C. M. & R. 757; *Baynes v. Brewster*, (1841) 2 Q. B. 375.

(d) *Grant v. Moser*, (1843) 5 M. & G.

(e) *Cohen v. Huskisson*, (1837) 2 M. & W. 477; *Ingle v. Bell*, (1836) 1 M. & W. 516; *Webster v. Watts*, (1847) 11 Q. B. 311.

(f) *Wheeler v. Whiting*, (1840) 9 C. & P. 262; *Howell v. Jackson*, (1834) 6 C. & P. 723.

ruption at a public meeting do not of themselves constitute a breach of the peace, but it is otherwise if the disturbance amount to the obstruction of a public officer in the execution of his duty (a).

Degree of
force lawful.

It is only lawful to use such violence as is reasonably necessary to restrain the offending party from executing further disturbance. The proper plea is that in the first instance the defendant *molliter manus imposuit* (b).

But in place of public tumult and violence it is the right and duty of all citizens to unite in putting it down, and for this purpose to use all necessary force, even to the taking of life. "Every one is bound to aid in the suppression of riotous disturbances. The degree of force which may be lawfully used in their suppression depends upon the nature of such riot, for the force used must always be moderated and proportional to the circumstances of the case and of the end to be obtained. The taking of life can only be justified by the necessity for protecting persons and property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed, or in the case of persons whose conduct has become felonious through disobedience to the provisions of the Riot Act and who resist the attempt to disperse or apprehend them" (c).

Use of mili-
tary forces.

If the military forces of the Crown are employed in suppressing a riot their *status* is that of ordinary citizens. The fact that they possess special arms and organisation is simply a reason for not lightly employing them (d). It is sometimes supposed that it is never lawful to fire at a mob until the Riot Act has been read, or, at any rate, until a magistrate's order has been given. This, however, is erroneous. "No officer is justified by English law in standing by and allowing felonious outrage to be committed merely because of a magistrate's

(a) *Spilsbury v. Micklethwaite*, (1808) 1 Taunt. 146; *Wooding v. Oxley*, (1839) 9 C. & P. 1. As to what amounts to obstructing apprehension, see *Reg. v. Green*, (1861) 8 Cox, C. C. 441.

(b) *Bullen & Leake*, 3rd ed. p. 797. As to justification for handcuffing see *Reg. v. Taylor*, (1895) 59 J. P. 393.

(c) Report on the Featherstone Riots, pp. 9, 10, Parliamentary Papers, 1893. The late Lord Bowen was the principal author of this Report.

(d) *Ibid.* See *R. v. Pinney*, (1832) 5 C. & P. 254; *Redford v. Birley*, (1822) 3 Stark. 76.

absence. . . . An order from a magistrate who is present is required by military regulations (a), and wisdom and discretion are entirely in favour of such a practice. But the order of the magistrate at law has no legal effect. Its presence does not justify the firing if the magistrate is wrong, its absence does not excuse the officer in declining to fire when the necessity exists" (b).

It must frequently happen that in the suppression of a riot the innocent suffer along with the guilty. But if the force used is reasonable and proper under the circumstances, the person employing it is none the less protected, though he may cause damage to one entirely guiltless of participation in the misconduct of the mob (c).

If a felony or treason has in fact been committed, it is lawful to arrest and take before the magistrate any one suspected on reasonable and probable grounds of being the guilty person (d). The question of reasonableness is one for the judge to decide as in an action of malicious prosecution (e), but the burden of proof is different. A defendant who justifies an arrest has to prove affirmatively that he acted on good grounds (f). A plaintiff who alleges himself injured by a legal process has to establish a negative, and show that the proceedings against him were destitute of foundation. It is an *à fortiori* case that an actual felon may be arrested, and for this purpose it appears that after demand and refusal it is lawful to break open the outer door of a dwelling-house (g).

Where felony
committed.

It is lawful to arrest in order to prevent a deadly injury being inflicted, or a treason or felony being committed, and in this case also an outer door may be broken for the purpose of effecting the arrest (h). But as this power is given rather for the prevention

To prevent
deadly injury,
treason or
felony.

(a) Queen's Regulations, 1892, sec. 8, par. 63.

(b) Report on the Featherstone Riots, p. 10.

(c) See *Baxter v. Oliver*, Times, June 17th, 1892.

(d) 2 Inst. p. 52, per Lord Tenterden, *Beckwith v. Philby*, (1827) 6 B. & C. p. 638. A constable can act on reasonable suspicion even though no offence has been committed. *Ibid.* See Ch. XXII.

(e) *Lister v. Perryman*, (1870) L. R. 4 H. L. 521. As to what is reasonable, see Ch. XIX.

(f) *Allen v. Wright*, (1838) 8 C. & P. 522; *Hanson v. Waller*, (1901) 1 K. B. 390.

(g) Hale, P. C., Vol. 2, pp. 77 *sqq.*; Fost. C. C. 320.

(h) *Handcock v. Baker*, (1800) 2 B. & P. 260; Hawkins, P. C., 7th ed., Vol. 3, p. 183.

than for the punishment of crime, it would seem that unless the arrested person has actually broken the peace he cannot be detained after the danger is over.

In case of
misde-
meanour.

There is no authority at common law to arrest without warrant on suspicion of misdemeanour, although a misdemeanour has in fact been committed, nor although the party arrested be actually guilty (a). It is indeed said in Hawkins' Pleas of the Crown that in certain cases an offending party may be detained if caught in the act (b). There appears, however, to be no case in which this statement of the law has been acted upon. It is also said that suspicious nightwalkers may be arrested (c), but this again can hardly be accepted as an accurate statement of the law in the present day. However, by statute very extensive power is given to private individuals of arresting in case of misdemeanour. By the Vagrant Act (d) any person may apprehend any person found offending against the Act, and forthwith take him before a justice of the peace or deliver him to a constable. By 9 Geo. IV. c. 69, s. 2, night (e) poachers found committing the offence may be arrested either immediately or on pursuit by owners and occupiers of land, lords of manors, and their servants, and taken before a magistrate. By 1 & 2 Will. IV. c. 32, s. 31, any person found trespassing in pursuit of game at any time may be required to give his name and quit the land. If he refuses to do either he may be arrested by persons occupying or possessing sporting rights over land, and their servants, and taken before a magistrate.

Statutory
powers.
Vagrant Act.

Poaching.

Lighting and
watching.

By the Lighting and Watching Act (f) persons who wilfully damage lamps and other property may be apprehended by persons witnessing the offence and handed over to a constable.

Highway Act.

By the General Highway Act (g) offenders against the Act, whose names are unknown may be apprehended by or under the authority of surveyors of highways or by persons witnessing the offence and taken before a magistrate. Offenders

(a) *Per* Tindal, C.J., *Mathews v. Biddulph*, (1841) 3 M. & G. p. 395. See *Fox v. Gaunt*, (1832) 3 B. & Ad. 798; East, P. C., Vol. 1, p. 303.

(b) Vol. 2, p. 120.

(c) *Ibid.*; and see *Lawrence v.*

Hedger, (1810) 3 Taunt. 14.

(d) 5 Geo. IV. c. 83, s. 6.

(e) The time is defined by s. 12.

(f) 3 & 4 Will. IV. c. 90, s. 55.

(g) 5 & 6 Will. IV. c. 50, ss. 78, 79.

against s. 78 may be apprehended by those witnessing the offence.

By the Poor Law Amendment Act (a) masters of workhouses and persons acting on their authority may apprehend persons bringing into a workhouse without authority spirituous or fermented liquors, and take them before a magistrate.

Masters of workhouses.

By 2 & 3 Vict. c. 47, s. 66 (one of the Metropolitan Police Acts), "any person found committing any offence punishable either upon indictment or as a misdemeanour upon summary conviction" under the Act . . . "may be apprehended by the owner of the property on or in respect to which the offence shall be committed, or by his servant or any person authorised by him, and may be detained until he can be delivered into the custody of a constable to be dealt with according to law." There is a corresponding provision in the Towns Police Clauses Act (b).

Metropolitan Police Acts.

Towns Police Clauses Act.

By the Canal Act (c) persons found committing any offence punishable under the Act by summary conviction may be apprehended by the owners of property with respect to which such offence shall be committed, or by their servants or agents, and handed over to a constable. If property is offered to any person and he reasonably suspects that any such offence under the Act has been committed with respect to it, or that it has been stolen or unlawfully obtained, he may apprehend the party offering the property and hand him over to a constable.

Canal Act.

By 14 & 15 Vict. c. 19, s. 11, any person may arrest "any person who shall be found committing" any indictable offence at night (d), and may "convey him or deliver him to some constable or other peace officer."

Indictable offences at night.

Any person "found committing" any offence punishable by virtue of the Larceny Act (e), with the exception of the offence of angling in the daytime, "may be immediately apprehended without a warrant by any person and forthwith taken . . . before some neighbouring justice of the peace," "and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence had been committed on or with

Larceny Act.

(a) 4 & 5 Will. IV. c. 76, s. 92.

see s. 13.

(b) 10 & 11 Vict. c. 89, s. 15.

(c) 24 & 25 Vict. c. 96, s. 103. See,

(e) 3 & 4 Vict. c. 50, ss. 11, 12.

too, 38 & 39 Vict. c. 25, s. 12, as to naval

(d) *I.e.*, between 9 p.m. and 6 a.m., stores, &c.

- respect to such property," is authorised and required to apprehend the party offering the property, and to take him and it before a justice. Similar powers are given against any person "found committing" an offence punishable under the Malicious Injuries to Property Act to "the owner of the property injured or his servant or any person authorised by him" (a).
- Injuries to Property Act.**
- Coiners Act.** Any person may apprehend any person "found committing any indictable offence against the Coinage Act and hand him over to an officer of the peace" (b).
- Pedlars Act.** By the Pedlars Act (c) any person on whose ground a pedlar is, or to whom he offers goods, may demand inspection of his certificate, and on refusal may arrest and take him before a magistrate.
- Prevention of Crimes Act.** By the Prevention of Crimes Act (d), owners and occupiers of property and their tenants may arrest and hand over to a constable persons twice previously convicted whom they find on their property and who give an unsatisfactory account of themselves.
- Pawnbrokers Act.** By the Pawnbrokers Act (e) a pawnbroker reasonably suspecting (f) that an article offered in pawn to him has been stolen or otherwise illegally and clandestinely obtained, may seize and detain and deliver as soon as may be to a constable the article itself and the person offering it or either of them.
- Army Act.** Under the Army Act (g) "upon reasonable suspicion that a person is a deserter" he may be apprehended by any constable, and in the absence of a constable by any person and taken forthwith before a magistrate.
- Explosives Act.** By the Explosives Act (h) persons found committing offences against the Act under circumstances of danger may be arrested by the occupiers of endangered property, local authorities, and the servants of railway and canal companies.
- Prevention of Cruelty to Children Act, 1904.** By the Prevention of Cruelty to Children Act, 1904 (i), any constable may take into custody, without warrant, any person who within view of such constable commits an offence against the Act.

(a) 24 & 25 Vict. c. 97, s. 61.

(b) 24 & 25 Vict. c. 99, s. 31.

(c) 34 & 35 Vict. c. 96, s. 18.

(d) 34 & 35 Vict. c. 112, s. 7.

(e) 35 & 36 Vict. c. 93, s. 34.

(f) See *Howard v. Clarke*, (1888) 20 Q. B. D. 558.

(g) 44 & 45 Vict. c. 58, s. 154.

(h) 38 & 39 Vict. c. 17, s. 78

(i) 4 Ed. VII. c. 15, s. 4.

It will be observed that in nearly all these statutes it is a condition of the power to apprehend that the person apprehended should have been "found committing" some offence or "found offending." He must be detected in the physical perpetration of the crime (a). Thus when the gist of the offence is the state of the man's mind, or where the offence is one of omission, there is no power of summary arrest. A man cannot, for example, well be found committing the offence of embezzlement or of neglecting to maintain his family (b). The person who discovers the act must be aware of its criminality at the time. If A. sees B. taking away property and from what he afterwards hears from C. discovers that B. was guilty of larceny, A. does not find B. committing the larceny (c). A man cannot be found committing an offence which he is merely attempting to commit (d). He must be detected at its completion or during its continuance. A thief who is found in possession of stolen property during the continuance of the asportation, however long, is found committing the theft (e). The offender must be either apprehended in the very act or at any rate must be immediately pursued. "Suppose a party seen in the act of committing a crime were to run away and immediate and fresh pursuit to be made, I think that would be sufficient" (f). It will be observed that in some of the statutes authority is given "immediately" to apprehend, while in others the word "immediately" does not occur. There seems, however, to be no practical difference between the two classes of enactments. In both the intention is to enable parties who discover a criminal at work to act then and there. What is an immediate apprehension is a question of fact for the jury (g). If the pursuit be sufficiently fresh it does not appear to be material that the offender is not actually apprehended by the person who found

Found
committing.

(a) It is insufficient to justify arrest for the offence to have been committed very recently (*Griffith v. Taylor*, (1876) 2 C. P. D. 194).

(b) *Field v. Musgrove*, (1867) 16 L. T. N. S. 536; *Horley v. Rogers*, (1860) 2 E. & E. 674.

(c) See *Downing v. Capel*, (1867) L. R. 2 C. P. 461.

(d) *Leete v. Hart*, (1868) L. R. 3

C. P. 322.

(e) *Griffith v. Taylor*, (1876) 2 C. P. D. 194.

(f) Per Tindal, C.J., *Hanway v. Boulton*, (1830) 1 Moo. & R. p. 19; see *Rex v. Howarth*, (1828) 1 Moo. C. C. 207; *Downing v. Capel*, (1867) L. R. 2 C. P. 461; *Griffith v. Taylor*, (1876) 2 C. P. D. 194.

(g) *Griffith v. Taylor*, *supra*.

Owner of
property.

him offending (a). In certain cases of offences against property the owner and his agents are allowed to arrest. The word "owner," it is apprehended, would include generally a possessor.

Brawling in
place of
worship.

By 23 & 24 Vict. c. 32, s. 2, riotous and indecent behaviour in any church or registered place of worship and interruption of an officiating minister are offences punishable on summary conviction. By s. 3 of the same Act offenders may be immediately apprehended by a churchwarden of the place and taken before a magistrate (b). It appears, however, that in the absence of indecorous conduct a request to leave is a necessary preliminary to ejectment (c).

Offences in
respect of
passenger
steamers.

By 57 & 58 Vict. c. 60, s. 287, the master or other officer of any duly surveyed passenger steamer, and any person called by him to his assistance, may apprehend and take before a magistrate any person of unknown name and address who is guilty of evading payment of fares, injuring the vessel, molesting the passengers or crew, or of certain other kinds of disorderly conduct defined by the Act.

Offences
against
railway
companies.

By 8 & 9 Vict. c. 20, ss. 103 (d), 104, 154, and 52 & 53 Vict. c. 57, s. 5, power is given to the officers and servants of railway companies to arrest persons whose names and addresses are unknown, or who refuse to give their names and addresses, and who have committed certain specified offences, such as refusing to pay their fares, deliver up tickets, etc.

By the Tramways Act (e) servants of tramway companies may arrest and take before a magistrate passengers committing or attempting to commit frauds, if their names and addresses are unknown (f).

Duty of party
arresting.

Whenever power of summary arrest on a criminal charge is given it is for the purpose of immediate investigation before a magistrate, and no arrest can be justified which is not for this purpose (g). It is a bad plea to say that a felony had been

(a) See *Downing v. Chapel*, *supra*, p. 207.

(b) As to what constitutes the offence, see *Kennit v. St. Paul's Dean and Chapter*, (1905) 2 K. B. 249; *Williams v. Glenister*, (1824) 2 B. & C. 699; *Cope v. Barber*, (1872) L. R. 7 C. P. 393.

(c) *Ballard v. Bond*, (1837) 1 Jur. 7.

(d) The first part of this section is

repealed by the Statute Law Revision Act of 1892.

(e) 33 & 34 Vict. c. 78, s. 52.

(f) In this connection see *Wilson v. Fearnley*, (1905) 69 J. P. 165.

(g) For statutory rule in cases of arrest without warrant see s. 38, Summary Jurisdiction Act, 1879.

committed, that there was reasonable and probable cause for suspecting the plaintiff and that he was arrested and taken to a certain spot for identification (*a*). It is not lawful to detain a man in custody without warrant while evidence against him is being collected, since it is for the magistrate to grant a remand if the case is not ripe for hearing (*b*). The statutes authorising arrests without warrant generally provide that the arrested party shall be taken immediately or forthwith before a justice of the peace, but these provisions are only declaratory of the common law (*c*). So jealous is the law on this point that if the prisoner be conducted by a circuitous instead of the ordinary direct road he may recover for a false imprisonment (*d*). No greater restraint may be placed on a prisoner than is necessary for his safe detention. If there be reasonable apprehension of a rescue or escape he may be handcuffed, but not otherwise (*e*).

8. A person who has escaped from lawful custody is still considered theoretically a prisoner, and his recapture is but a continuance of his former imprisonment (*f*). It may therefore be effected without the restrictions as to time or place which may have been attached to the original execution of the process against him. Thus a sheriff may not enforce a civil writ on a Sunday, but he may on that date retake a person who, being in custody by virtue of such a writ, has escaped (*g*). So a person privileged from arrest is not privileged from recapture (*h*). So in effecting a recapture, at any rate upon a fresh pursuit, it is lawful to break open the outer door of a dwelling-house (*i*). And, on this principle, it was held that where a party had been formally arrested by touching him through a broken window, it was lawful thereupon to break into the house in order to

Escape from custody.

(*a*) *Hall v. Booth*, (1834) 3 N. & M. 316.

(*b*) *Wright v. Court*, (1825) 4 B. & C. 596.

(*c*) A person arrested under the Game Act, 1 & 2 Will. IV. c. 32, s. 31, must be discharged unless brought before a justice in twelve hours. For rule in extradition cases see 33 & 34 Vict. c. 52, s. 8, and *Reg. v. Weil*, (1882) 9 Q. B. D. 701.

(*d*) *Morris v. Wise*, (1860) 2 F. & F.

51; *O'Brien v. Brabner*, (1885) 49 J. P. 227.

(*e*) *Reg. v. Taylor*, (1895) J. P. 393; and *Wright v. Court*, *supra*.

(*f*) *Anon.*, (1704) 6 Mod. 231.

(*g*) *Ibid.*

(*h*) *Ex parte Lyne*, (1822) 3 Stark. 132.

(*i*) *Fost. C. C.* 320; *East, P. C.* Vol. 1, p. 324; *Genner v. Sparks*, (1704) 6 Mod. 173.

effect his actual apprehension (a). A principal is always considered to be in the custody of his bail, and the bail may discharge himself at any time by making the custody actual and handing over his prisoner to the custody of the law. In so doing he has the same licence of procedure as in any other recapture (b).

Assisting
officers of
the law.

4. If a private individual acts as the mere servant or assistant of a constable or other officer engaged in effecting an arrest or carrying out any other process of the law, and the circumstances are such as to justify the conduct of the officer, the person assisting will also be justified, although he would not have been entitled to act by himself, for it cannot be unlawful to take part in a lawful act. And it may sometimes happen that a man may be justified in actually directing an arrest which it would have been unlawful for him to effect personally. If A. suspect B. of felony, no felony having in fact been committed, and thereupon make a charge against him to C., a constable, who in consequence arrests, C. is justified, because he had a right to act on A.'s information, but A. is not (c). But if C. reasonably suspect B. apart from any information supplied by A., then he can make the arrest on his own authority; and if under such circumstances A. give B. in charge to C., he does not become thereby the originator of the arrest. He simply calls upon C. to do what C. would apart from any such invitation be authorised and bound to do, and if liable at all is only liable to the same extent as C. So if a constable have a right to arrest for a breach of the peace, a bystander who calls upon him to do so is not liable, although the circumstances might not have justified the bystander had he made the arrest himself (d).

Statutory
protection.

The protection (e) given by 24 Geo. II. c. 44, s. 6, to constables and other officers executing invalid warrants of magistrates, and by 51 & 52 Vict. c. 43, s. 54, to county court officers executing invalid process of the county court, includes

(a) *Sandon v. Jervis*, (1858) E. B. & Bing. 523.
E. 935 and 942.

(b) *Anon.*, (1704) 6 Mod. 231; *Ex parte Lyne*, *supra*, p. 209.

(c) *Hedges v. Chapman*, (1825) 2

(d) *Derecourt v. Corbishley*, (1855)

5 E. & B. 188.

(e) See Ch. XXII.

private individuals acting by the order and in the aid of such officers. The language would appear to point rather to the case of persons who act in a subordinate capacity as mere assistants and who do not take upon themselves to direct the proceedings (a).

5. A private person may without an express warrant confine a person disordered in his mind who seems disposed to do mischief to himself or any other person (b). There is no power at common law to apprehend or detain a lunatic simply because he is a lunatic. It has been already pointed out that it is always lawful to use such force as to prevent a deadly act of violence being done, and it seems to be simply an exemplification of this principle that a person, whose state of mind is such from frenzy and delirium as to render him a standing danger to others and himself, may be subjected to such restraint as is necessary to prevent that danger (c).

The permanent care and control of lunatics is regulated by the Lunacy Act, 1890 (d). Their detention (e) must as a rule take place under a detention order made by the judicial authority defined by the Act (f). But in cases of urgency the lunatic can be detained for a short time under an urgency order signed by a private individual and accompanied by a medical certificate (g). A judicial reception order must be made upon petition (h), but pauper lunatics, wandering lunatics, and

Lunatics.

Detention orders.

(a) Cp. *Painter v. Liverpool Gas Co.*, (1836) 3 A. & E. 433. In *Nathan v. Cohen*, (1812) 3 Camp. 257, the defendant had caused a warrant to issue against the plaintiff, directed to three constables, had gone with them and pointed out the plaintiff as the person to be arrested. Lord Ellenborough held that he was within the protection of 21 Jac. I. c. 16, s. 5, which speaks of certain officers and those who act "in their aid and assistance or by their commandment," the words being disjunctive. In the statutes referred to in the text, the act for which protection is claimed must have been by the order and also in aid of the officer.

(b) Bac. Ab. Trespass, D. 3.

(c) *Per Lord Mansfield, Brookshaw*

v. Hopkins, (1772) Loft, p. 243; see *Re Greenwood*, (1855) 24 L. J. Q. B. 148. In *Fletcher v. Fletcher*, (1859) 1 E. & E. 420, the Court used general language which might seem to convey the notion that the mere fact of lunacy justified the confinement of the sufferer. The judges did not, it is conceived, mean this. The distinction between harmless and dangerous lunatics was not material for them to consider.

(d) 53 & 54 Vict. c. 5, as amended by the Lunacy Act, 1891 (54 & 55 Vict. c. 65).

(e) As to the removal to the place of detention, see s. 35.

(f) ss. 9, 10.

(g) s. 11.

(h) s. 4; as to procedure thereon, see ss. 5—8.

lunatics not properly cared for, may be confined under orders made in a summary way (a). The requirements of the Act must be strictly complied with, and failure in any particular entitles the person detained to be discharged upon *habeas corpus*, provided this can be done without danger to himself or others (b). Thus a medical certificate which is not in substantial accordance with the form provided in the Act is altogether invalid (c).

An urgency order remains in force only for seven days (d). A judicial order is in force for a year, and may thereafter be from time to time continued in the manner provided by the Act (e). A patient may at any time be discharged on a writ of *habeas corpus* if the Court is satisfied that he is not a fit person to be detained (f), or by the order of the Lunacy Commissioners (g), or of the visitors of an asylum, whether private or public (h). The persons on whose petition a reception order is made, or the authority liable for the maintenance of a pauper lunatic, may direct his discharge (i). It is further the duty of the custodian of a patient upon the patient's recovery to give due notice to the persons responsible, and thereupon to discharge the patient at the end of seven days if he is not removed in the interval (k).

Execution of
deed by
lunatic.

It may be convenient to mention that the execution by a lunatic, so found by inquisition, of any deed or instrument disposing of his property, even if the deed be executed in a lucid interval, is altogether invalid so long as the inquisition is not superseded (l).

Recaption.

If a person lawfully in custody under a reception order escapes,

(a) ss. 13—21. As to lunatics found so by inquisition, see s. 12.

(b) See *Re Greenwood*, (1855) 24 L. J. Q. B. 148.

(c) See *Re Greenwood*, *supra*; *Lowe v. For*, (1885-7) 12 App. Cas. 206.

(d) s. 11 (6).

(e) s. 38.

(f) See *per Parke, B.*, *Norris v. Sued*, (1849) 3 Ex. p. 792.

(g) s. 75.

(h) ss. 77, 78. But an order for a patient's discharge does not act as an automatic discharge of an order of Court

appointing a receiver and manager of the patient's property (*B. A. S.*, *In re*, (1898) 2 Ch. 392).

(i) ss. 72, 73. But in spite of such order there is power to detain the patient if dangerous (s. 74). As to what amounts to an order of discharge, see *Lowe v. For*, (1885-7) 12 App. Cas. 206.

(k) s. 83.

(l) *Walker, In re*, (1905) 1 Ch. 160. C. A.; as to the execution of a power of attorney by a lunatic in a lucid interval, see *Daily Telegraph Newspaper Co. v. M'Laughlin*, (1904) A. C. 776.

the custodian may cause him to be recaptured at any time within fourteen days from the time of the escape, without any fresh order or certificate (a).

It is unlawful to use mechanical means of bodily restraint against a patient "unless the restraint is necessary for purposes of surgical or medical treatment, or to prevent the lunatic from injuring himself or others" (b).

Means of restraint.

A reception order good on the face of it is a sufficient authority for the reception and detention of a lunatic at the place named in the order, and "the order may be acted on without further evidence of the signature or of the jurisdiction of the person making the order" (c). It is further provided that any person presenting a petition, any person signing or carrying out or doing any act with a view to sign or carry out what is or purports to be a reception order or certificate, and finally any person doing anything in pursuance of the Act, shall not be liable to any civil proceedings, whether on the ground of want of jurisdiction or on any other ground, if he has acted in good faith and with reasonable care (d).

Effect of reception order.

There are several classes of persons with regard to whose conduct in the detention and restraint of alleged lunatics questions may arise, namely, persons making urgency orders, persons presenting petitions for reception orders, judicial authorities making reception orders, medical men signing certificates, and the persons actually in charge of the lunatics under reception orders and their subordinates.

Statutory protection.

A person who signs an urgency order is liable for the consequent imprisonment if, in fact, it is wrongful, either by reason of any irregularity of procedure, or because the state of mind of the person against whom the order is made is not such as to justify his detention (e). But this liability is limited by the provisions of s. 330.

Parties signing urgency orders.

(a) s. 85.

(b) s. 40.

(c) s. 35. In the corresponding section of the repealed Act (8 & 9 Vict. c. 100, s. 15), there are words enabling the order to be pleaded in answer to any action.

(d) s. 330. It is apprehended that the issue of good faith and reasonable care is on the plaintiff. See *Lowe v. Fox*, (1885-7) 12 App. Cas. 206.

(e) See *Fletcher v. Fletcher*, (1859) 1 E. & E. 420.

Parties procuring judicial orders.

A person who procures a reception order from a judicial authority is liable, it is apprehended, only to an action in the nature of an action of malicious prosecution, that is to say, if he has acted maliciously *and* without reasonable and probable cause. He has therefore a better protection by the common law than that which is given him by s. 330, which does not excuse a party who has acted in bad faith *or* unreasonably.

Judicial authority.

A judicial authority is only liable where there is absence of jurisdiction (a), and then subject to the provisions of s. 330.

Medical man.

A medical man signing a certificate is in no case liable to an action of false imprisonment, because the confinement of the supposed lunatic is not directly his act. He is only answerable, if at all, when he commits a breach of duty in giving a certificate without reasonable grounds, or in bad faith (b).

Keepers of asylums.

With regard to the persons having custody of lunatics under reception orders valid on the face of them, there seems some doubt whether such orders are an absolute protection (as they apparently were under 8 & 9 Vict. c. 100, s. 99), or whether, in spite of such orders, they do not act unlawfully in receiving and detaining persons whom they know to be entitled to their liberty (c). If the latter view is taken there would seem to be no difference between the protection afforded by an order good on the face of it, and that afforded by an order bad on the face of it, except that the apparent defects of an order may supply cogent evidence of negligence or bad faith (d).

The use of force towards a lunatic in a manner unnecessary or forbidden by the statute of course constitutes an assault. It is equally clear that a detention after the reception order has run out or otherwise been invalidated is a false imprisonment (e), subject to the provisions of s. 330. No doubt also an action would lie if any custodian of a lunatic neglected to give notice

(a) See Ch. XXII.

(b) See *Hall v. Semple*, (1862) 3 F. & F. 337.

(c) The manager of a hospital or licensed house is not bound by any public duty to receive any particular lunatic. S. 27 (4) expressly so provides with respect to lunatics sent under summary reception orders and orders of

Commissioners, and *a fortiori* must it be so in the case of other lunatics.

(d) As to the statutory notices of reception required to be given by the keepers of private institutions licensed under the Lunacy Acts, see 54 & 55 Vict. c. 65, s. 20.

(e) And is also made a statutory misdemeanour by s. 222.

of the recovery of a patient and to liberate him as provided by s. 83.

A reception order may be for the detention of a patient in an institution for lunatics, or as a single patient. An institution for lunatics, other than an asylum or hospital, means a licensed institution (*a*), and the order must state whether the lunatic is to be detained in an asylum, hospital, house, or as a single patient (*b*). It is apprehended that an order directing a lunatic's detention as a single patient would be no justification for any person detaining him in a place where other lunatics were kept. If the licence of the keeper of a lunatic asylum is revoked or expires, it would seem to follow that his whole authority is thereupon gone (*c*). Nor will *bonâ fide* belief, by the owner of a sanatorium, that persons under medical treatment therein are not insane justify their reception and detention, or avoid penalties, if such patients are found upon inquisition to be, in fact, lunatics (*d*).

Place of
reception.

A father (or, with certain qualifications, a mother in the case of an illegitimate child (*e*)), has a right to the custody and control of the persons of his children up to the age of twenty-one years (*f*). This right does not vary in kind according to the age of the child, though no doubt an exercise of authority which might be just and lawful towards a child of tender years might be outrageous towards one approaching full age (*g*). He is entitled to prevent the child from leaving his roof against his will. And it makes no difference in this respect that the child is above the age (*h*) at which the Courts of Common Law refused to grant a *habeas corpus* to restore a child to its father's custody (*i*). Thus it has been

Parental
authority.

(*a*) s. 341.

(*b*) Schedule 2, form 3.

(*c*) S. 222 makes it a misdemeanour on the part of the keeper of a house if two months after the expiration or revocation of a licence there are two or more lunatics in the house.

(*d*) *Reg. v. Bishop*, (1880) 5 Q. B. D. 259.

(*e*) *Reg. v. Barnardo*, (1891) 1 Q. B. 194, C. A.

(*f*) Black. Com. Vol. 1, p. 453; *In re Agar Ellis*, (1893) 24 Ch. D. 317. This right, however, is not only liable to be forfeited by misconduct or abandon-

ment, but also to be superseded by the superior right of the Crown as *parens patriæ* acting through the Court as its delegate, as to which see above, p. 4, note (*b*).

(*g*) *Per* Bowen, L.J., *In re Agar Ellis*, (1893) 24 Ch. D. p. 338.

(*h*) Fourteen in the case of boys, sixteen in that of girls.

(*i*) Whatever the age of the child, there is no power in a Court or Judge to order the issue of a writ of *habeas corpus* directed to a person who at the date of the order is out of the jurisdiction (*Re v. Pinckney* (1904) 2 K. B. 84, C. A.).

suggested that an action of false imprisonment would not lie against a father who forcibly stopped his daughter aged sixteen from eloping to Gretna Green (*a*). And it is apprehended that if the child leaves the father's house against his will he may, unless the Court interferes to restrain him from so doing (*b*), resort if necessary to the use of force for the purpose of regaining possession of the child, just as he may in the case of the recaption of chattels (*c*). In *Reg. v. Jackson* (*d*), where it was held that a husband could not forcibly retake possession of his wife's person for the purpose of enforcing his right of *consortium*, the Court were careful to distinguish the case from that of a father retaking possession of his child under age (*e*). The apparent effect of the Custody of Children Act, 1891, is however to give an unlimited discretionary power to the Court in all matters relating to the custody of children under the age of twenty-one years (*f*).

It is also provided by s. 6 of the Prevention of Cruelty to Children Act, 1904 (*g*), that where a person having the legal charge of a child (under the age of sixteen years) is convicted of an offence against the Act, the Court adjudicating on the offence may, in its discretion, make an order as to the future custody of the child.

While a child remains in the custody of the father the latter may beat or imprison the former either to punish past or, it may be, restrain threatened misconduct (*h*). The force used must be reasonable in itself. Anything outrageous or cruel on a father's part clearly is an assault. But it is submitted that if a father

(*a*) *Per* Bowen, L.J., *In re Agar Ellis*, (1883) 24 Ch. D. p. 321; *per* Parke, J., *Barker v. Taylor*, (1823) 1 C. & P. 101. The *dicta* of Lord Esher, M.R., and Smith, L.J., in *Reg. v. Gyngall*, (1893) 2 Q. B. pp. 245, 253, as to a girl over sixteen being emancipated and having a right to act on her own views as to where she should reside are opposed to earlier authority. In *Todd v. Lynes* (Times, 26 July, 1873), Malins, V.-C., ordered a boy of seventeen, against his wish, to be delivered up to his father.

(*b*) Which the Court will do if for the benefit of the child (*In re Esther*

Lyons, (1869) 22 L. T. N. S. 770).

(*c*) See above, p. 152. It may be that if the father made his house a place unfit for a virtuous girl to live in, the daughter might lawfully leave it, and that if he attempted to retake her for the purpose of bringing her back there he would be guilty of false imprisonment.

(*d*) (1891) 1 Q. B. 671.

(*e*) *Ibid.*, pp. 681, 685.

(*f*) 54 & 55 Vict. c. 3.

(*g*) 4 Edw. VII. c. 15; see also 2 Edw. VII. c. 28, s. 5 (ss. 2 (6), The Licensing Act, 1902).

(*h*) 1 Bl. Com. 452.

acts in good faith and believes in the existence of a state of facts which would justify the use of force, he is not to be held guilty of an assault because his belief is unreasonable. However great the misconduct of the father, even though it be such that if brought before the Court it would cause him to be deprived of his paternal custody, it does not, it is apprehended, operate to invalidate his general authority so long as the custody in fact endures. But the authority exists only for the benefit of the child, and the maintenance of domestic discipline. A father must not punish arbitrarily, nor for disobedience to unlawful commands. If he orders his son to commit a crime, and beats him because he refuses, this is clearly an assault. Guardians, other than the father, are practically those appointed by the Court or by will (12 Car. II. c. 24, s. 8), or the surviving mother (under 49 & 50 Vict. c. 27). Generally as to the law relating to the custody, education and maintenance of infants, see Macqueen's Law of Husband and Wife, 4th ed. (1905), pp. 423 *seq.* As to illegitimate children see Simpson on Infants, 2nd ed., p. 136. A child with no guardian may, it seems, elect one for himself (*ibid.* p. 212). A person who undertakes the care and nurture of a child though without legal right would be entitled, it is apprehended, to chastise the child while the custody in fact continued. Usually where a person stands to a child *in loco parentis* he does so by virtue of delegation of authority by the parent, but it seems that such delegation is not essential to the establishment of that relation.

"The authority of a schoolmaster is, while it exists, the same as that of a parent. A parent, when he leaves his child with a schoolmaster, delegates to him all his own authority, so far as is necessary for the welfare of the child" (a). The authority of a master over his apprentice stands on the same footing (b). The only difference is that a child can be compelled to go to school, but by the common law no one can be bound apprentice without his own consent (c). A father, it is suggested above, is not liable to an action for the chastisement of an unoffending child so long

Authority of
schoolmaster.

(a) *Per* Cockburn, C.J., *Fitzgerald v. R.* 338.

Northote, (1865) 4 F. & F. p. 689; see
Reg. v. Hopley, (1860) 2 F. & F. 202.

(c) *R. v. Arnesby*, (1820) 3 B. & Ald.
584.

(b) *Pena v. Ward* (1835) 2 C. M. &

as he acts in good faith, but a schoolmaster, it would seem, can never be justified unless he acts with reasonable and probable cause (a). A man who takes on himself such an office may fairly be required to show prudence and judgment in the exercise of discipline. The authority of a schoolmaster is not strictly limited to the time during which the pupil is under his actual care. If the pupil on his way to or from school act in a manner detrimental to scholastic discipline, the master may punish him (b).

Master of
ship.

The master of a vessel on the high seas or in a foreign port (c) may be considered as standing in the position of the head of a family (d), and has disciplinary powers not only over the crew but the passengers also (e). The power is "based upon necessity and is limited to the preservation of necessary discipline and the safety of the ship" (f). It is obvious that the master of a vessel at sea may frequently be compelled to act in a very decisive and severe manner, if he is to maintain discipline and carry out his voyage, and therefore a licence will be accorded to him which would not be tolerated in the case of a parent or master.

(a) *Fitgerald v. Northcote*, (1865) 4 J. 291.
F. & F. 656.

(b) *Cleary v. Booth*, (1893) 1 Q. B. 465. But the master of a public elementary school may not without the consent of the parent set a child lessons to be done out of school, and punish for failure to learn such lessons (*Hunter v. Johnson*, (1884) 13 Q. B. D. 225).

(c) *Lamb v. Burnett*, (1831) 1 C. &

(d) *Per Tindal, C.J., Murray v. Moutrie*, (1834) 6 C. & P. p. 473.

(e) *Aldworth v. Stewart*, (1866) 4 F. & F. 957. In the case of emigrant ships these are defined by ss. 324, 325, of the Merchant Shipping Act, 1894.

(f) *Per Channell, B., Aldworth v. Stewart, supra*, at p. 961.

Canadian Notes to Chapter IX.

TRESPASS TO THE PERSON.

CONTINUANCE OF IMPRISONMENT (a).

Ontario.

Where the plaintiff was illegally in custody under a criminal charge (the warrant not being backed) his subsequent detention on a similar charge under a proper warrant was held legal, and the only damages recoverable were for the trespass up to the time of the backing of the warrant (b).

(a) P. 192, *supra*.

(b) *Southwick v. Hare*, 24 O. R. 528; cf. the New Brunswick case, *Ex parte McManus*, 32 N. B. R. 481, per Tuck, J.;

cf. Nova Scotia case, *Jordan v. McDonald*, 31 N. S. R. 129, exemplary damages not to be given where constable acted in good faith.

See *Bulmer v. O'Sullivan* (a).

Nova
Scotia.

IMPRISONMENT IN UNAUTHORISED PLACE (b).

Where after an escape and before recapture the penitentiary was changed from one building to another, held that imprisonment in the new building was lawful (c). **Manitoba.**

DISTINCTION BETWEEN FALSE IMPRISONMENT AND MALICIOUS PROCEDURE (d).

Where both parties conceded that it must be trespass or nothing and it was left to the jury, which found for the plaintiff, the defendants were not allowed to urge on appeal that trespass would not lie, there being an information and warrant and that they were not responsible for the magistrate's act (e). **Ontario.**

The trial of an action which on the face of the pleadings appeared to be one for false arrest having proceeded as though it were for malicious prosecution involving the consideration of malice, reasonable cause, &c., held that defendants' appeal must be allowed with costs and a new trial had (f). **Nova Scotia.**

NO ACTION FOR TRESPASS WHERE ACT JUDICIAL (g).

See *Anderson v. Wilson* (h).

Ontario.

ARREST BY MINISTERIAL OFFICER (i).

Where defendant M. in company with a constable called on plaintiff and demanded a float (on which he claimed a lien for salvage), and on his refusal to give it up without compensation he was arrested without a warrant, held that the arrest was the joint act of M. and the constable, and M. was therefore liable for damages for false imprisonment (k). **British Columbia.**

Where the plaintiffs, on the information of a constable, were in their absence convicted of damaging a spring on the highway, **Ontario.**

(a) 28 N. S. R. 406, barrister removed first time by order of stipendiary magistrate. He returns, is removed by police and locked up; recovers \$700 damages.

(b) P. 192, *supra*.

(c) *Reg. v. Peterson*, 6 Man. L. R. 311, conviction for escape not necessary to imprisonment for balance of sentence.

(d) P. 193, *supra*. See *Hunt v. McArthur*, 25 U. C. R. 90; *Doolan v. Martin*, 6 P. R. 319. Held, that trespass for assault and false imprisonment and

case for malicious prosecution are clearly not the same cause of action.

(e) *Campbell v. McDonell*, 27 U. C. R. 343, complicated case of misnomer of plaintiff in warrant.

(f) *McKenzie v. Jackson*, 31 N. S. R. 70.

(g) P. 193, *supra*.

(h) 25 O. R. 91, question as to sufficiency of information.

(i) P. 194, *supra*.

(k) *Robitaille v. Mason and Young*, 9 B. C. R. 499.

Ontario. and the magistrate issued a warrant to the constable who arrested the plaintiffs, held that the constable had acted as such in the execution of the warrant and was entitled to the statutory protection (a).

INTERVENTION (b).

Ontario. The mere laying an information and asking for warrant but not taking further steps or having conversation with the constable do not constitute intervention (c). But where the defendant interfered personally in an arrest, telling the constable to have the plaintiff taken away or right away, he was held liable in trespass (d). Where the complainant was himself a justice and with the other justice refused to give bail, held not an interference (e).

New Brunswick. A person applying to a magistrate for a warrant to arrest another for an alleged offence is deemed only to appeal to the magistrate to exercise his jurisdiction, and is not liable in trespass for an arrest under the warrant. But if he goes beyond this, and interferes in the exercise of the ministerial powers under the warrant, he will be liable (f). Where the defendant merely accompanied the constable for the purpose of bringing back the horse and wagon used by the constable and assisted the constable in extricating himself from the plaintiff's horse, which was trampling upon him, the defendant was held not to have rendered himself liable (g). Giving special direction to the officer making the arrest is an intervention (h).

Nova Scotia. Ordering the plaintiff off the premises and sending for a policeman to remove him, whereupon the policeman went so far as to take the plaintiff to the cells, was not sufficient to make the defendant responsible for the imprisonment (i).

RESPONSIBILITY OF SOLICITOR (k).

Ontario. Both the defendant and his attorney who improperly obtained an order for imprisonment against the plaintiff were held liable (l).

(a) *Gaul v. Corporation of the Township of Ellice*, 3 O. L. R. 438 (1902), resolution of township council to indemnify magistrate against costs held *ultra vires*. But see *Moriarty v. Harris*, 10 O. L. R. 610 (1905), case of constable assaulting driver of watering cart to make him move to another part of the market on request of market clerk. Held defendant liable; cf. Nova Scotia case, *Gresham v. Town of Sydney Mines*, 27 N. S. R. 320.

(b) Pp. 196, 198, *supra*.

(c) *Smith v. Evans*, 13 U. C. C. P. 60.

(d) *Stephens v. Stephens*, 24 U. C. C. P.

424. See, however, *Conway v. Stribly*, 39 U. C. R. 519.

(e) *McKinley v. Munsie*, 15 U. C. C. P. 230.

(f) *Kingston v. Wallace*, 25 N. B. R. 573; cf. *Brown v. Moore*, 2 Pug. 407.

(g) *Maddox v. Murphy*, 27 N. B. R. 263.

(h) *Carter v. Purrington*, 2 All. 226.

(i) *Hubley v. Boak*, 4 R. & G. 82.

(k) P. 197, *supra*.

(l) *Hawkins v. Paterson*, 23 U. C. R. 197; cf. *Ponton v. Bullen*, 2 E. & A. 379; *Bullen v. Moodie*, 12 U. C. C. P. 126.

A person aiding and abetting a false imprisonment cannot New plead that he was merely the legal adviser of the magistrate (a). Brunswick.

PREVENTION OF BREACH OF PEACE (b).

The Criminal Code, s. 38, is to the same effect as the text.

DEGREE OF FORCE (c).

By the Criminal Code, s. 31, such force may be used "as may be necessary to overcome any force used in resisting such execution or arrest."

STATUTORY POWERS OF SUMMARY ARREST OR OF USING FORCE.

The Criminal Code of Canada, s. 552, provides for the arrest without warrant by anyone of anyone found committing the offences therein particularised (d). Canada.

This section, also sub-s. 2, particularises the further offences for which a peace officer may arrest without warrant.

Sub-s. 3 permits a peace officer to arrest without warrant anyone he finds committing any criminal offence (e), and any person to arrest anyone found committing any criminal offence by night (f).

Sub-s. 4 permits the arrest without warrant of person being pursued (g).

Sub-s. 5 permits an arrest without warrant by the owner of property.

Sub-s. 6 permits arrest without warrant by officer in His Majesty's service of person conveying liquor on board ship.

Sub-s. 7 permits arrest without warrant by peace officer of loiterers, &c.

ARREST UNDER SECT. 552.

A peace officer may under s. 22 or s. 552 (2) of the Criminal Code arrest a person on the strength of a request by telegram from another province (h). Sect. 22 of the Code operates, not merely to protect the officer, but to authorise and legalise the arrest (i).

(a) *Thompson v. Hatch*, 2 Kerr, 425.

(b) P. 200, *supra*.

(c) See p. 202, *supra*.

(d) Cf. s. 24.

(e) Cf. s. 27.

(f) Cf. s. 26.

(g) Cf. s. 29.

(h) *Reg. v. Cloutier*, 12 Man. L. R. 183.

(i) *Ibid.*, effect of s. 552 (7) (a) considered.

Canada. By s. 561 of the Code a person reasonably suspected of being a deserter may be arrested and brought before a justice of the peace for examination.

62 & 68 Vict. c. 49 (Canada) (Tickets of Leave, &c.), s. 8, in certain cases a peace officer may without warrant arrest a ticket-of-leave man.

4 Edw. VII. c. 23 (Canada), The Militia Act, provides, s. 112, for taking into custody anyone "who interrupts or hinders any portion of the Militia at drill."

Ontario. R. S. O. 1897, c. 43 (Agriculture and Arts), ss. 27 and 28, gives the officers of agricultural societies and their constables power to eject from the fair grounds persons violating the rules.

R. S. O. 1897, c. 60 (Division Courts), s. 55, gives the Division Court bailiff during the holding of Court power of arresting disturbers with or without warrant.

R. S. O. 1897, c. 102 (Expenses of Criminal Justice), s. 8, discourages the arrest of vagrants for the purpose of making fees.

R. S. O. 1897, c. 120 (Petty Trespasses), s. 2, enables a peace officer or the owner (or his representative) to make an arrest without warrant.

R. S. O. 1897, c. 245 (Liquor Licences), s. 132 (2), gives a power of arrest without warrant to the police where a person found on unlicensed premises gives a false address or unsatisfactory answers.

R. S. O. 1897, c. 248 (Public Health), s. 110, gives power to a board or officer, when empowered "to disinfect any person or thing or to isolate any person," to use such force and employ such assistance as is necessary.

Alberta and Saskatchewan. C. O. N. W. T. 1898, c. 19 (Public Health), s. 23, arrest of offenders upon view.

C. O. N. W. T. 1898, c. 89 (Liquor Licences), s. 73, permits arrest, on view, of persons gaming or allowing gaming on licensed premises.

British Columbia. R. S. B. C. 1897, c. 67 (Elections), ss. 172—175, gives deputy returning officers power to arrest disturbers at the polling stations.

R. S. B. C. 1897, c. 88 (Game), s. 28, allows the apprehension without a warrant by a constable or peace officer of an offender against the Act.

R. S. B. C. 1897, c. 91 (Health Act), ss. 77, 78, gives health officers power to remove and isolate infected persons.

R. S. B. C. 1897, c. 163 (Railways), s. 41 (10), passengers refusing to pay fare may be ejected using no unnecessary force.

Manitoba. R. S. M. 1902, c. 6 (Animals Diseases), s. 24, provides for arrest without warrant by veterinarian or constable of offender against provisions of this Act with respect to infected places.

R. S. M. 1902, c. 38 (County Courts), s. 356, gives power to

bailiff to arrest without warrant anyone insulting the judge or **Manitoba** interrupting the proceedings.

R. S. M. 1902, c. 52 (Elections), s. 58, a registration clerk has power to arrest personators and disturbers; s. 241, a deputy returning officer has power of arresting, by verbal order, any disturber at the election.

R. S. M. 1902, c. 72 (Home for Incurables), s. 33, permits the summary arrest by officers or employees of disorderly persons within the institution.

R. S. M. 1902, c. 101 (Liquor Licences), s. 147, allows the arrest, "on view," of gamblers and the proprietor of the licensed premises.

R. S. M. 1902, c. 116 (Municipal), s. 82, a deputy returning officer has power to arrest disturbers at election.

R. S. M. 1902, c. 133 (Pollution of Streams), s. 6, permits a peace officer to arrest, "without any warrant on view," any offender against this Act.

R. S. M. 1902, c. 149 (Reformatory for Boys), s. 35, permits the summary arrest of disorderly persons within the institution by the officers or employees.

R. S. M. 1902, c. 169 (Petty Trespasses), s. 3, a trespasser may be arrested without warrant by peace officer, owner, &c.

C. S. N. B. 1903, c. 33 (Protection of Game), s. 43, a **New** warden or constable may arrest without warrant persons **Brunswick** violating Act.

C. S. N. B. 1903, c. 34 (Fisheries), s. 31 (d), peace officer may arrest without warrant, offender against Act.

C. S. N. B. 1903, c. 36 (Public Parks), s. 16, police may remove disturbers or violators of rules.

C. S. N. B. 1903, c. 53 (Public Health), s. 54 *et seq.*, gives powers of isolation of infected persons.

C. S. N. B. 1903, c. 99 (Reformatories), s. 9, arrest of vagrant child.

C. S. N. B. 1903, c. 166 (Towns Incorporation), s. 110, arrest by police constable, without warrant, for certain municipal offences.

C. S. N. B. 1903, c. 175 (Pedlers), s. 6, a constable may arrest, without warrant, a pedler who refuses to show his licence.

R. S. N. S. 1900, c. 5 (Elections), s. 85, arrest of disturber on verbal order. **Nova Scotia.**

R. S. N. S. 1900, c. 55 (Compulsory Attendance at School), s. 23, truants may be arrested by truant officer.

R. S. N. S. 1900, c. 70 (Municipal Corporations), s. 70, presiding officers at elections may arrest on verbal order.

R. S. N. S. 1900, c. 71 (Towns), s. 203, constable may, on view, arrest person for furious driving.

R. S. N. S. 1900, c. 99 (Railways), s. 274, provides for summary arrest by railway constable.

Nova
Scotia.

R. S. N. S. 1900, c. 102 (Public Health), ss. 22 *et seq.*, removal of infected persons.

R. S. N. S. 1900, c. 116 (Prevention of Wrongs to Children), s. 3, officer may take into custody child under sixteen found in improper house.

USE OF MILITARY FORCES (a).

Canada.

4 Edw. VII. c. 23 (The Militia Act), provides, ss. 80—87, for the aid of the civil power. The procedure is by requisition from the civil authorities. The officers and men become without further appointment special constables, but act only as a military body in obedience to "their militia superior officer only" (b).

HANDCUFFING PRISONER (c).

Ontario.

Where the warden of a prison directed a constable to arrest a workman who was detected conveying tobacco to a prisoner, and the constable, though under no apprehension of an escape, handcuffed him and led him through the public streets to the police station, it was held that, though the arrest was legal, the constable was liable in trespass for the handcuffing (d).

LUNATICS (e).

Ontario.

Where the defendant, knowing the plaintiff to be sane, maliciously procured from the medical superintendent a warrant for his arrest, it was held that *trespass* would not lie (f).

STATUTES RELATING TO CONFINEMENT OF LUNATICS.

Ontario.

R. S. O. 1897, c. 317 (Lunatic Asylums: Public).

R. S. O. 1897, c. 318 (Private Lunatic Asylums) (g).

Alberta and
Saskatche-
wan.

C. O. N. W. T. 1898, c. 90 (Insane Persons).

British
Columbia.

R. S. B. C. 1897, c. 101 (Hospitals for Insane Act). This deals with both public and private asylums.

(a) P. 202, *supra*.

(b) The extent to which the volunteer militia are subject to military law and to the command of their officers is discussed in *Cole v. Croke*, Q. R. 12 K. B. 519.

(c) P. 209, *supra*.

(d) *Hamilton v. Massie*, 18 O. R. 585.

(e) P. 211, *supra*. N.B.—A tort-feasor

cannot plead insanity in answer to an action for assault: *Taggard v. Innes*, 12 U. C. C. P. 77.

(f) *Dobbyn v. Decour*, 25 U. C. C. P. 18, his remedy was case for the malicious procedure.

(g) This Act applies to inebriate asylums established under s. 529 of the Municipal Act (3 Edw. VII. c. 19).

R. S. M. 1902, c. 80 (Insane Asylums Act).

Manitoba.

C. S. N. B. 1903, c. 100 (Provincial Lunatic Asylum).

New

C. S. N. B. 1903, c. 101 (Dangerous Lunatics).

Brunswick.

R. S. N. S. 1900, c. 46 (Local Lunatic Asylum).

Nova

Scotia.

PARENTAL AUTHORITY (a).

The Criminal Code, s. 55, recognises in a parent "force by way of correction," tempered by s. 58, making him "criminally responsible for any excess." Canada.

SCHOOLMASTERS (b).

By the various School Acts of the Provinces, teachers are required as a matter of duty "to maintain proper order and discipline" in their schools (c).

As a rule the methods of maintaining these things are not detailed, although in some instances a power of suspension is specified (d).

The Criminal Code, s. 55, authorises parents, persons in the place of parents, *schoolmasters*, &c., to use force by way of correction towards any children under their care "provided such force is reasonable under the circumstances"; but by s. 58 "everyone by law authorised to use force is criminally responsible for any excess" (e).

Where the action of the schoolmaster does not amount to assault or trespass, but merely to the suspension of the pupil from instruction, it would appear that a mandamus, and not an action, is the proper remedy (f).

SHIPMASTER (g).

The Criminal Code provides :

Sect. 56, Discipline on Ships. It is lawful for the master or officer in command of a ship on a voyage to use force for the purpose of maintaining good order and discipline on board of his ship, provided that he believes on reasonable grounds that such

Canada.

(a) P. 215, *supra*.

(b) P. 217, *supra*.

(c) See R. S. O. 1897, c. 292, s. 76 (1); c. 293, s. 41 (3); c. 294, s. 35 (3); C. O. N. W. T. 1898, c. 75, s. 102 (2); R. S. B. C. 1897, c. 170, s. 72 (3); R. S. M. 1902, c. 143, s. 194 (c); C. S. N. B. 1903, c. 50, s. 85; R. S. N. S. 1900, c. 52, s. 105 (a).

(d) *E.g.*, R. S. O. 1897, c. 292, s. 76 (9).

(e) Applied in *Rex v. Gaul*, 36 N. S. R. 504 (1904). A schoolmaster may be convicted of assault for the too severe chastisement of a pupil: *Reg. v. Smith* (1893), 14 C. L. T. 54 (New Brunswick).

(f) *McIntyre v. Blanchard School Trustees*, 11 O. R. 439; cf. British Columbia case, *Phelps v. Williams*, 1 B. C. R., Pt. I., 257.

(g) P. 218, *supra*.

Canada. force is necessary, and provided also that the force used is reasonable in degree.

This of course is qualified by s. 58, as to excess.

New Brunswick. Apparently, in New Brunswick, sailors are not considered to be over tender in their feelings. For where a sailor at the wheel had allowed the vessel to slightly veer from her course "the master of the ship approached him using very coarse and insulting language towards him, and struck him a blow in the face with his fist, which he said left a red mark and was inflamed. The master also called for a hammer and told the sailor he would knock his brains out with it." Held not sufficient to entitle him to a discharge under s. 58 of the Seamen's Act; sailors in general were not much alarmed at abusive language, and the assault was not very serious (a).

Nova Scotia. A master confining one of his crew whom he suspected of stealing, during a search (having produced warrants to be issued against him), was sued for false imprisonment. Held that he acted within the scope of his authority (b).

See *Gordon v. Gordon* (c) as to common law right of correction of seamen by master.

(a) *Ex parte Lowery*, 13 C. L. T. 251 (1893).

(b) *Leith v. Trott*, 4 R. & G. 120.
(c) 7 N. S. R. (1 Geldert & Ox) 80.

CHAPTER X.

SEDUCTION AND LOSS OF SERVICE.

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WHERE the relation of master and servant exists the right which the one has to the service of the other is regarded by the law as a species of property or interest, a wrongful infringement of which causing actual damage is a good cause of action (*a*). It has been already pointed out that an action lies for *maliciously* procuring a breach of contract, whether the contract be of service or otherwise (*b*). This remedy is merely a particular application of the general principle that each man shall be answerable for the damage which he intentionally causes to his neighbour without any legal excuse or justification, but has only of late years been fully recognised in the English law (*c*). Actions for loss of service, on the other hand, are of great antiquity, and had their origin in a state of society when service as a rule was a matter not of contract but of status (*d*). At common law if A. took the servant of B., he took what originally at any rate was regarded as the chattel of B., and thereby he committed a trespass. So if a servant was beaten this was a trespass on the property of the master. It was early settled, however, that such a trespass was not actionable *per se*, but that it was necessary to allege, with a *per quod*, actual damage by reason of the loss of service (*e*). The action, therefore, though founded on a notion of trespass, was in substance for the consequential damage, and there was considerable fluctuation of opinion as to its proper

Right to service a species of property.

Historical origin of action for loss of service.

(*a*) *Per Cur. Grinnell v. Wells*, (1844) 7 M. & G. p. 1041.
 (*b*) See above, pp. 17 and 24, 25.
 (*c*) In *Bacen v. Hall*, (1881) 6 Q. B. D. 333. As to the further extension in *Flood v. Jackson*, (1896) 2 Q. B. 21, see above, p. 25.
 (*d*) Year Book, 11 Hen. IV. fol. 2, M. 22; Hen. VI. fol. 30.
 (*e*) *Robert Marys's case*, (1612) 9 Rep. p. 113 a.

form (a). It was, however, finally settled that the plaintiff might declare either in trespass or case (b).

If a female servant was debauched and carnally known and through a consequent illness her master was deprived of her service, the carnal knowledge being a physical act committed against the will of the master was considered a trespass, and so alleged in the old form of pleading (c).

If the injury to the servant is produced not by a trespass but by an act of negligence, the master has nevertheless a right of action for loss of service (d).

Statute of
Labourers.

By the first Statute of Labourers it was made a criminal offence for a servant to leave his service before the end of his term, or for any party to receive and keep a servant who had so left (e). Subsequently to the passing of this Act the Courts began to entertain actions founded on the breach of duty thereby created both for knowingly enticing servants away from their employment and for knowingly harbouring servants who had previously left their employment (f). The statute was repealed by 5 Eliz. c. 4, but the class of actions which had originated under it had by this time become inveterate.

No action
for enticing
servant where
he breaks no
contract.

It will be observed that the words of the statute are directed against dealings with servants "*ante finem termini concordati*" (before the end of the term agreed), and this seems to show the action lies only where there is a breach of contract. If the servant does no wrong in leaving his employment neither does the person who instigates him. Therefore if a man has contracted to serve for a definite period, it is lawful to induce him to leave at the conclusion of such period, even though otherwise

(a) *Macfadzen v. Olivant*, (1805) 6 East, 387.

(b) *Ditcham v. Bond*, (1814) 2 M. & S. 436; *Chamberlain v. Hazlewood*, (1839) 5 M. & W. 515. It is to be noticed that the question of form of action may still be important with reference to the period of limitation.

(c) See *Edmondson v. Machell*, (1787) 2 T. R. 4.

(d) *Martinez v. Gerber*, (1841) 3 M. & G. 88.

(e) 23 Edw. III. The second chapter of the statute is as follows: "If any

reaper, mower, or other workman or servant, of what estate or condition he be, retained in any man's service, do depart from the said service without reasonable cause or licence before the term agreed, he shall have pain of imprisonment; and that none under the same pain presume to receive or to retain any such in his service."

(f) See the argument of Coleridge, J., on this point in *Lumley v. Gye*, (1853) 2 E. & B. pp. 253 *seq.*, which is approved in *Bowen v. Hall*, (1881) 6 Q. B. D. 333.

he would in fact have continued in the old service (a). So it is lawful to procure a piece-worker to leave his employ as soon as the work in hand is finished (b). However, in *Keene v. Boycott* (c), the servant in question was an infant and employed under a voidable contract with the plaintiff. He did avoid this contract and left his service at the inducement of the defendant, and it was held that there was a good cause of action. But this case seems contrary to principle and may be taken to be overruled by the decision of the Court of Appeal in *De Francesco v. Barnum* (d). The defendant there had enticed away an apprentice of the plaintiff. But the indenture contained unreasonable stipulations, and it was held that it might be avoided by the apprentice, and that it was not unlawful for the defendant to persuade the apprentice to do that which was lawful. It is different however if malice (e), force, or fraud be used to take or decoy the servant away. In that case the master has a right of action, even though the servant be under no binding obligation (f).

And *à fortiori* it is unlawful for persons to combine together to induce a breach of contract of service in others (g).

It is at any rate clear that if a service is once lawfully determined no action can lie against any one who receives or harbours the servant. In *Forbes v. Cochrane* (h) the defendant sheltered on board of a British man-of-war certain slaves who had escaped from the service of the plaintiff in Florida, and it was held though the enticing of the slaves would have been actionable, since according to the law of Florida their servitude was lawful, yet that such servitude ceased directly they came under the British flag and consequently that they might lawfully be harboured.

When service determined no action for harbouring servant.

So long as the obligation of the servant to his first master continues, there lies on all other people who know that fact a duty not to aid and abet such servant in breach of his contract of

Harbouring with knowledge.

(a) *Per* Lord Kenyon, *Nichol v. Martyn*, (1799) 2 Esp. p. 734.

(b) *Hart v. Aldridge*, (1774) 1 Cowp. 54; but see *Anon.*, (1774) Loft, 493.

(c) (1795) 2 H. Bl. 511.

(d) (1890) 45 Ch. D. 430.

(e) *Leathem v. Craig*, (1899) 2 Ir. R.

667, C. A.; *Bowen v. Hall*, (1881) 6 Q. B. D. 333, C. A.

(f) *Per* Willes, J., *Evans v. Walton*, (1867) L. R. 2 C. P. pp. 621-2.

(g) *South Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A. C. 239.

(h) (1824) 2 B. & C. 448.

service. Therefore if a person ignorantly takes into his employment one who ought to be serving elsewhere, he is bound on becoming aware of the breach of contract to dismiss him, otherwise he becomes liable to an action for harbouring with knowledge (a).

Motive
material.

The old forms of pleading in actions for enticing away or harbouring servants, besides alleging knowledge of the service, always alleged that the defendant did the act complained of, "contriving and intending to injure the plaintiff." Whether the latter averment was regarded as material and traversable was not very clear. No doubt in the majority of cases the fact of knowledge is practically conclusive of malice. But there may be cases in which the defendant *bonâ fide*, in the servant's own interest, advises him to break his contract. It was at one time thought that in such cases action would not lie, but in view of the decision of the House of Lords in the case of the *South Wales Miners' Federation v. Glamorgan Coal Co.*, this presumption is no longer tenable (b). Nor is it in all cases essential that the defendant should have been actuated by a desire either to injure the plaintiff or to benefit himself at the plaintiff's expense (c). The old theory that the whole gist of the right of action lies in the malicious intent, and that only where this is made out to the satisfaction of the Court is the aggrieved party entitled to damages against the defendant (d), in the light of recent decisions, being no longer a correct exposition of the law.

Wrongful act
causing death
of servant.

It was held in *Osborn v. Gillet* (e), that a master could not recover damages for a loss of service caused by a wrongful act which resulted in the immediate death of the servant. And the maxim *actio personalis moritur cum personâ* was held to apply. From the judgment, however, Bramwell, B., dissented, and certainly his reasoning appears to be far more satisfactory than that of the majority of the Court.

Wrongful act
also a breach
of contract
with servant.

The case of *Alton v. Midland R. Co.* (f) was long supposed to

(a) *Blake v. Lanyon*, (1795) 6 T. R. 221; see *Foster v. Stewart*, (1814) 3 M. & S. 192.

(b) (1905) A. C. 239.

(c) *Bowen v. Hall*, (1881) 6 Q. B. D.

333.

(d) *Temperton v. Russell*, (1893) 1 Q. B. 715, C. A.; *Leatham v. Craig*, (1899) 2 Ir. R. 667.

(e) (1873) L. R. 8 Ex. 88.

(f) (1865) 19 C. B. N. S. 213.

decide that where a servant was injured by an act of the defendant which was a breach of contract with the servant the master could not recover for loss of service. It has recently however been explained that this case simply turned on a point of pleading (a).

The rule is that if a servant is injured by positive misfeasance the master has his right of action none the less because the misfeasance is also a breach of contract, but if the servant has no remedy except by alleging a breach of contract, then the master has no right of action. A master cannot recover against a carrier who delays a servant on his journey, but it is otherwise if the carrier breaks the servant's leg.

Under the colour of an action for the loss of services a father may obtain redress for injury to his domestic or paternal right if his child is beaten or injured or taken or kept from his custody or control, and especially if his daughter is debauched and thereby rendered ill (b). A person who has accepted the responsibility and duty of a father stands on the same footing (c).

Action for loss of service of child.

Although the allegation of loss of service in actions of this nature is in general a mere fiction, yet it is still one which it is necessary technically to prove. The plaintiff therefore cannot recover where the child in respect of whom the alleged injury has arisen is of such tender years as to be incapable of any act of service (d).

Loss of service must be technically proved.

It is, however, in cases where the wrongful act consists in the debauching of a daughter, or a person owing the duty of a daughter, that the difference between form and substance operates most frequently to cause difficulty and work injustice.

Seduction of daughter.

The plaintiff must prove an act of carnal intercourse and a consequent disablement of the daughter from service, either by her confinement or otherwise. If she has been intimate with more men than one and afterwards has a child, the only person liable is the man to whom the paternity is attributable (e). It must

Seduction must cause illness.

(a) *Per* A. L. Smith, L.J., *Taylor v. M. S. & L. R. Co.*, (1895) 1 Q. B. p. 140; *per* Esher, M.R., and A. L. Smith, L.J., *Meux v. Great Eastern R. Co.*, (1895) 2 Q. B. p. 391 and p. 394. See also *Berringer v. Great Eastern R. Co.*, (1879) 4 C. P. D. 163.

233; *Berringer v. Great Eastern R. Co.*, *supra*; *Evans v. Walton*, (1867) L. R. 2 C. P. 615.

(c) *Irwin v. Dearman*, (1809) 11 East, 23.

(d) *Hall v. Hollander*, (1825) 4 B. & C. 660.

Service at time of seduction and time of illness.

(b) *Jones v. Brown*, (1794) Peake,

(e) *Eager v. Grimwood*, (1847) 1 Ex.

further appear that there was a service both at the time of the original wrongful act and at the time of the subsequently accruing injury. If there is no service at the former date the whole foundation of the action fails; there is no relation between the plaintiff and the defendant, and no right of the former is infringed. Although there be a subsequent service which is interrupted in consequence of what has previously happened this is no cause of action, for the master takes the risk of the condition of the servant at the time of the commencement of the employment (a). If there is no service at the latter date there is no damage sustained, for the gist of the action is not the debauching itself, nor any other consequential damage except the loss of service (b).

Right of
service when
daughter
under age.

A father, or a person in the position of a father, can establish a *prima facie* case by showing that the girl in question is under the age of twenty-one and unmarried (c). In such circumstances he has a right to her service, and this he does not lose unless he voluntarily parts with it by permitting her to transfer her filial duty to another person, or to enter into some other service which is inconsistent with service to himself (d). It follows that if the girl has been in service away from home and the engagement terminates, the right of the father at once revives, and she is considered as being in his service even before she is restored to her home (e). On the other hand, if the young woman is over age some proof of actual service is necessary, but the service need not be rendered under any legal obligation (f). A daughter cannot as a rule be said to be in her father's service if she lives

Where over
age must be
some actual
service.

61. In *Boyle v. Brandon*, (1845) 13 M. & W. 738, the question was raised whether an action would lie where the illness was caused not by the seduction, but the subsequent desertion of the daughter by the defendant. But the damage would seem to be very remote. See *Allsop v. Allsop*, (1860) 5 H. & N. 534.

(a) *Davies v. Williams*, (1847) 10 Q. B. 725.

(b) *Grinnel v. Wells*, (1844) 7 M. & G. 1033; *Harris v. Butler*, (1837) 2 M. & W. 539; *Eager v. Grimwood*, *supra*.

(c) Formerly the action of seduction was held not to be maintainable with-

out proof that the relationship of master and servant existed, and in all cases some service was held necessary. The rule was afterwards so far relaxed that if the child was a minor and unmarried and not in the service of any one else, the service to her father was presumed.

(d) *Dean v. Peel*, (1804) 5 East, 45; *Blaymire v. Haley*, (1840) 6 M. & W. 55; *Whitbourne v. Williams*, (1901) 2 K. B. 722.

(e) *Terry v. Hutchinson*, (1868) L. R. 3 Q. B. 599.

(f) *Bennett v. Allcott*, (1787) 2 T. R. 166.

independently, even though she contribute to his support or otherwise perform acts of filial duty (a). It is not necessary that she should be actually living under his roof. Where a father occupied two farms and resided at one while the daughter looked after the domestic affairs of the other, it was held that there was good proof of service (b). In a modern Irish case (c), the plaintiff's daughter was *sui juris* and maintained herself independently in lodgings, having an engagement during the day-time. In her leisure hours she was accustomed to assist her mother in her household affairs. The seduction took place under her father's roof, and it was held by a majority of the Court that there was sufficient evidence of service to support the action. No English authority has gone to the extent of this case.

If a married daughter lives apart from her husband with her father and does acts of service the father may have a cause of action for her seduction (d). Married daughter.

Any participation in household affairs or the performance of trivial domestic duties will afford sufficient evidence of service. Service how proved.
 "Making tea has been held to be an act of service" (e).

In *Speight v. Oliviera* (f) the defendant under pretence of providing a place for the plaintiff's daughter, who was twenty-three years old, caused her to leave home and debauched her. She subsequently returned to the plaintiff and had a child. Abbott, C.J., held that as there had been no real engagement of service with the defendant the relation of master and servant originally existing between the father and the daughter had continued unchanged throughout. This decision would clearly have been right had the daughter been under age. It would seem, however, that the fact of her being *sui juris* made a substantial distinction. It was not necessary in order that the father should lose his right that she should form another valid contract; it Termination of service fraudulently procured.

(a) *Manley v. Field*, (1859) 7 C. B. & C. 387.
 N. S. 96.

(b) *Holloway v. Abell*, (1836) 7 C. & P. 528.

(c) *O'Reilly v. Glavey*, (1892) 32 L. R. Ir. 316. The actual decision may be justified on the ground mentioned below, p. 226.

(d) *Harper v. Luffkin*, (1827) 7 B.

(e) *Per* Abbott, C.J., *Carr v. Clarke*, (1818) 2 Chit. p. 261; *Bennett v. Allcott*, (1787) 2 T. R. 166.

(f) (1819) 2 Stark. 493. It would have been different if the action had been for decoying away and not for debauching. See *Evans v. Walton*, (1867) L. R. 2 C. P. 615.

was sufficient that she should in fact cease to serve him, which was the case. There was neither a right of service nor an actual service.

Continuance
of service in
temporary
absence.

If actual service or a right of service is shown, the relationship continues though the servant be temporarily absent on a visit without entering any fresh service (a). In *Griffiths v. Teetgen* (b) the defendant had requested the plaintiff to allow his daughter temporarily to look after the defendant's shop, his wife being absent, and it was agreed that some payment should be made for her assistance. The defendant seduced the daughter while resident with him, and she returned home and was there confined. It was held that the plaintiff had a good cause of action, as the daughter must be considered the visitor rather than the servant of the defendant.

Conversely if the daughter goes regularly into service away from home, but is permitted to return on a visit, she will not during the time of such visit become her father's servant though she do acts of service to him (c).

If a daughter resides at home but goes out to work during the day, such service is not inconsistent with the relationship of master and servant existing between herself and her father; and the Court will not be curious to enquire whether she was debauched while abroad or while at home (d).

Although in an action of seduction the plaintiff must allege and prove loss of service, yet it would seem that in some cases damage may be obtained for a seduction without loss of service. If the seduction takes place under the father's roof, the circumstances being such as to negative a licence express or implied for the seducer being there, or such as to make him a trespasser *ab initio*, the father, according to Lord Holt's opinion (e), may bring his action of trespass for breaking and entering the house and lay the seduction as matter of aggravation. "No action lies for the

(a) See *Edmondson v. Machell*, (1787) 2 T. R. 4.

(b) (1854) 15 C. B. 344.

(c) *Thompson v. Ross*, (1860) 5 H. & N. 16; *Hedges v. Tagg*, (1872) L. R. 7 Ex. 283; *Whitbourne v. Williams*, (1901) 2 K. B. 722.

(d) *Ogden v. Lancashire*, (1866) 15 W. R. 158; *Rist v. Fauz*, (1863) 4 B. & S. 409.

(e) *Per Holt, C.J., Russell v. Corn.* (1703) 6 Mod. 127, cited by Buller, J., in *Bennett v. Allcott*, (1787) 2 T. R. p. 167.

master for the battery of his servant without a *per quod*, yet it may well be put in as matter of aggravation. Suppose a man get another's maid or daughter with child, no trespass lies for it. Yet if he that has done it comes into the house without the owner's leave, he may put the getting his daughter with child for aggravation." The right of action for seduction does not however pass to a master's assignees on his bankruptcy (a); nor does it survive the death of the parent on whose loss of service, had he lived to the birth of the child, it might have been founded.

Thus in the Irish case of *Hamilton v. Long* (b) (where a daughter, debauched two months before the death of her father, continued residing with, and performing acts of service for, her mother up to the date of her confinement) it was held that neither at common law nor under the Married Women's Property Acts could the mother maintain an action for the seduction of her daughter.

A husband has a right to the society and service of his wife just as a father has to the service of his daughter, and for injury to this right the law gives analogous remedies (c). The old action for criminal conversation was an action for loss of service, and could not be maintained where the husband had entirely abandoned his right to the society of the wife (d). This action no longer exists at common law, but by 20 & 21 Vict. c. 85, s. 33, a husband may present a petition in the Divorce Court solely for damages on the ground of the respondent's adultery with the petitioner's wife, and such petition is to be decided on the same footing as the old action for criminal conversation subject to this, that if a husband cannot succeed in a petition for divorce he cannot succeed in a claim for damages. If there has been condonation no damages can be recovered, which was not the case at common law (e). But where damages are recoverable the

Action by husband for loss of wife's service.

Action of crim. con. abolished.

(a) *Howard v. Crowther*, (1841) 8 M. & W. 601.

(b) *Hamilton v. Long*, (1903) Ir. R. 2 K. B. 407.

(c) *Smith v. Kaye and Another*, (1904) 20 T. L. R. 261.

(d) *Weedon v. Timbrell*, (1793) 5 T. R.

C.T.

(e) *Bernstein v. Bernstein*, (1893) P. 292. But in *Izard v. Izard*, (1889) 14 P. D. 45, it was held that a husband living apart from his wife under a separation deed might recover damages.

Action for
enticing away
and harbour-
ing wife.

measure of such damages is not to be assessed solely upon the basis of loss of society, although one main ground is the breaking up of the household (*a*). The remedy, however, is still at common law if a wife is merely induced to leave her husband, or if, after having left she is harboured and maintained (*b*). It is, of course, a defence to such action if the husband have so misconducted himself that the wife is justified in quitting him, and it would seem that it is also a defence if it be honestly believed that such a state of facts exists (*c*).

Action for
personal
injuries to
wife.

A husband may sue apart from his wife for personal injuries done to her by trespass or negligence, in consequence of which she is rendered less able to discharge her domestic duties or otherwise to render assistance to him in his affairs (*d*).

Right of wife
to sue for loss
of *consortium*
of husband.

It would seem to be an open question whether under any circumstances a wife can have a right of action for deprivation of her husband's society. In *Lynch v. Knight* (*e*) the majority of the law lords expressed an opinion in favour of such an action being maintainable, although they decided against the plaintiff on the ground that the alleged consequential injury was not sufficiently connected with the alleged wrongful act. Lord Wensleydale, on the other hand, expressly held that no such action would lie. The right of the wife, if any, must stand on a footing very different from the right of the husband, for the latter has a right of control and a claim of service which the former has not. It has never been held or suggested that a wife can sue by reason of an injury to her husband which prevents him from maintaining her as well as he might otherwise have done, although in case of his death she may have a remedy under 9 & 10 Vict. c. 93; or under the provisions of the Workmen's Compensation Act, 1897 (*f*).

(*a*) *Evans v. Evans*, (1899) P. 195.

(*b*) *Winsmore v. Greenbank*, (1745) Willes, 577. This cause of action seems to be untouched by the decision in *Reg. v. Jackson*, (1891) 1 Q. B. 671. It is apprehended that the husband in that case, though he could not compel the wife to live with him, would have had a good cause of action against her relations who harboured her and persuaded

her not to return to him. See above, p. 5.

(*c*) *Berthon v. Cartwright*, (1796) 2 Esp. 480; *Philp v. Squire*, (1791) Peake, 114.

(*d*) *Brockbank v. Whitehaven Junction R. Co.*, (1862) 7 H. & N. 834.

(*e*) (1861) 9 H. L. C. 577.

(*f*) 60 & 61 Vict. c. 37.

In the case of an ordinary servant the master may recover not merely the actual damage sustained up to the time of action brought, but also in respect of the future service which he is likely to lose (a). It would seem, however, that he ought to be limited to the period for which he has a binding contract of service. Any further damage founded on a speculation that the service would continue beyond the agreed time would be too remote. If, however, the action is based on the malice of the defendant, there is no such limitation, and if the justice of the case requires it, exemplary damages may be given. In *Gunter v. Astor* (b) the plaintiff's workmen were employed simply by the piece. The defendant induced them all to quit suddenly, leaving their work unfinished, and the business of the plaintiff was thereby ruined. He recovered 800*l.* damages, being the amount of two years' profits, and it was held not to be an excessive sum (c).

Damages in case of ordinary servant.

Damages aggravated by malice.

In an ordinary case, however, the damages for procuring a breach of contract will not exceed those which might be recoverable for the breach of the contract itself (d).

Where the plaintiff stands in a parental or quasi-parental relation to the person the loss of whose service he alleges, he can generally recover for the injury to his feelings as well as for the actual loss sustained. This is not, however, so in every case, as for instance, where the defendant has simply been guilty of an act of negligence without any intentional wrong-doing (e) towards the plaintiff. It is, however, customary to allow the plaintiff to recover any expense for nursing, attendance, and the like to which he may have been put, although it would not of itself apart from loss of service be an actionable damage (f).

Damages for injury to feelings.

When the action is for debauching a female servant the injury to the plaintiff's feelings is always a matter of aggravation, whether he occupy a parental relation or not (g). In this

Damages in action of seduction.

(a) *Hodgson v. Stallebrass*, (1840) 11 A. & E. 301.

(b) (1819) 4 Moore, 12.

(c) See too *per* Crompton, J., *Lumley v. Gye*, (1853) 2 E. & B. p. 230; *Birby v. Dunlop*, (1876) 22 Amer. Rep. 475.

(d) *Bird v. Randall*, (1762) 3 Burr. 1346; *Quinn v. Leathem*, (1901) A. C.

495.

(e) *Flemington v. Smithers*, (1826) 2 C. & P. 292.

(f) *Flemington v. Smithers*, *supra*; *Dixon v. Bell*, (1816) 1 Stark. 287.

(g) *Howard v. Crowther*, (1841) 8 M. & W. 601.

kind of action the whole conduct of the parties and their position in life, though not their means, are to be taken into consideration (*a*). It is an aggravation of the damage if the defendant did the wrong while received as an honourable suitor (*b*): on the other hand, it is a mitigation if the plaintiff has himself been a negligent and imprudent guardian (*c*). The defendant may further seek to reduce the damages by proving the woman to be of bad reputation, but he cannot give in evidence specific acts of misconduct on her part (*d*) except with a view of attributing the paternity of her child to some one else, in which case the evidence is admissible not on the question of damages but as a defence to the action (*e*). Evidence of the woman's good character cannot be given in the first place, but only after the question has been raised by the defendant (*f*). Lord Ellenborough decided in two cases that the mere fact that she had been cross-examined as to her character did not put it in issue (*g*), but must be taken simply as an impeachment of her credit; on the other hand, in a later case, after such cross-examination evidence of good character was held admissible (*h*).

(*a*) *Hodsoll v. Taylor*, (1873) L. R. 9 Q. B. 79.

(*b*) *Elliot v. Nicklin*, (1818) 5 Price, 641; *Berry v. Da Costa*, (1866) L. R. 1 C. P. 331.

(*c*) In *Reddie v. Scoolt*, (1795) Peake, 316, the plaintiff had suffered the defendant, whom he knew to be married, to court his daughter on the representation that he was about to procure a divorce, and Lord Kenyon directed a nonsuit. It would seem, however, that nothing short of absolute connivance would deprive the plaintiff of all right

of action. See *Duberley v. Gunning*, (1791) 4 T. R. 651.

(*d*) *Scott v. Sampson*, (1882) 8 Q. B. D. 491.

(*e*) *Foulkes v. Selway*, (1800) 3 Esp. 236; *Jones v. James*, (1868) 18 L. T. N. S. 243.

(*f*) *Garbutt v. Simpson*, (1863) 32 L. J. M. C. 186.

(*g*) *Bamfield v. Massey*, (1808) 1 Camp. 460; *Dodd v. Norris*, (1814) 3 Camp. 519.

(*h*) *Bate v. Hill*, (1823) 1 C. & P. 100.

SEDUCTION AND LOSS OF SERVICE.

LABOURERS DESERTING SERVICE (a).

A person hiring himself to work with his own team of oxen is not within the British statutes for punishing labourers deserting their service (b). **Ontario.**

ENTICEMENT BY FATHER OF SERVANT.

In cases where the father and son (a minor) enter into articles and the son by the father's order refuses to complete his apprenticeship, the proper remedy against the father is not for enticing away, but on his covenant in the articles (c). **Ontario.**

COMBINATION TO INTIMIDATE WORKMAN (d).

See *Hynes v. Fisher* (e). **Ontario.**

HARBOURING (f).

See R. S. O. 1897, c. 161 (Apprentices and Minors), s. 21, **Ontario.** penalty for employing or harbouring absconding apprentices.

MOTIVE OF PERSON ENTICING SERVANT (g).

It is no excuse to an action for persuading a servant to break his contract that the persuader is not actuated by ill will to the master, but acts in good faith in pursuance of the provisions of the constitution of a trade union of which he and the servant are members (h). **Ontario.**

SEDUCTION: PATERNITY OF CHILD (i).

See *Kimball v. Smith* (k); *Ryan v. Miller* (l); *Evans v. Watt* (m); *Milligan v. Thompson* (n). **Ontario.**

(a) P. 220, *supra*.

(b) *Whelan v. Stevens*, Tay, 439 (1827), case on Statutes of Labourers: 20 Geo. II. c. 19; 31 Geo. II. c. 11; 6 Geo. III. c. 25.

(c) *Dillingham v. Wilson*, 6 O. S. 85; see *Black v. Stevenson*, 3 U. C. R. 160.

(d) See p. 221, *supra*.

(e) 4 O. R. 60.

(f) P. 221, *supra*.

(g) P. 222, *supra*.

(h) *Branch v. Roth*, 10 O. L. R. 284 (1905), the principles of *South Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A. C. 239, and *Read v. Friendly Society of Operative Stonemasons*, (1902) 2 K. B. 732, applied.

(i) P. 223, *supra*.

(k) 5 U. C. R. 32.

(l) 21 U. C. R. 202; 22 U. C. R. 87.

(m) 2 O. R. 166.

(n) 23 O. R. 54.

SERVICE MUST BE AT THE TIME OF SEDUCTION (a).

Ontario. See *McKersie v. McLean* (b).

INDEPENDENT SERVICE (c).

Manitoba. The plaintiff sued defendant for the seduction of her daughter fourteen years of age. At the time the seduction took place the girl was living as a domestic servant at the defendant's house, the wages to be paid to the mother. Held no evidence that girl remained the servant of the mother (d).

GIRL RESIDING AT HOME, BUT GOING OUT TO SERVICE (e).

Ontario. Where the girl, by agreement with her mistress, was at liberty to do certain services for the plaintiff (her brother) at home, for which she received compensation under contract with him, held that he was entitled to maintain an action (f).

SEDUCTION OR RAPE.

Ontario. In *E. v. F.* (g) the plaintiff's daughter swore that the defendant was the father of her child, but that the connection effected with her by the defendant was by force and without her consent. Held, that the jury might be satisfied as to the paternity and connection and discredit the evidence of force.

DEATH OF PLAINTIFF IN ACTION FOR SEDUCTION.

Ontario. See *Chisholm v. Goodman* (h); *Ball v. Goodman* (i); *Healey v. Crummer* (k).

DEATH OF DEFENDANT.

Ontario. See *Lince v. Faircloth* (l).

INFANT DEFENDANT.

Ontario. See *Hyne v. Brown* (m); *Straughan v. Smith* (n).

(a) P. 224, *supra*.

(b) 6 O. R. 428, grandniece of plaintiff.

(c) See pp. 224 *et seq.*

(d) *Hebb v. Lawrence*, 7 Man. L. R. 222; *Carr v. Clarke*, 2 Chitty, 260, commented on.

(e) P. 226, *supra*.

(f) *Straughan v. Smith*, 19 O. R. 558; *Rist v. Faux*, 4 B. & S. 409, specially referred to.

(g) 10 O. L. R. 489 (1905); cf. *Cole v.*

Hubble, 26 O. R. 279; *Reg. v. Smith*, 19 O. R. 714. See further cases in Dig. Ontario Case Law, at p. 6320, as to felony.

(h) 6 C. L. J. 88, death after verdict.

(i) 10 U. C. C. P. 174, rights of administrator of original plaintiff.

(k) 11 U. C. C. P. 527, writ issued by father in lifetime.

(l) 11 C. L. T. Occ. N. 49.

(m) 13 P. R. 17.

(n) 19 O. R. 558.

STATUTES RELATING TO SEDUCTION.

R. S. O. 1897, c. 69 (Act respecting the Action for Seduction) (a): **Ontario.**

Sect. 1. "The father (b) or, in case of his death (c), the mother (d) (whether she remains a widow or remarries) of any unmarried female (e) who has been seduced, and for whose seduction the father or mother could maintain an action in case such unmarried female was at the time dwelling under his or her protection, may maintain an action for the seduction, notwithstanding such unmarried female was, at the time of her seduction (f), serving or residing with another person upon hire or otherwise" (g).

Sect. 2. "Upon the trial of an action for seduction brought by the father or mother (h) it shall not be necessary to prove any act of service performed by the person seduced, but the same shall in all cases be presumed, and no evidence shall be received to the contrary; but in case the father or mother of the female seduced had, before the seduction, abandoned her and refused to

(a) For the criminal liability for seduction, see Criminal Code, ss. 181—184.

(b) The father of an illegitimate child cannot bring the action merely on the ground of being her father: *Biggs v. Burnham*, 1 U. C. R. 106.

(c) Apparently the death of the father after seduction prevents the mother from maintaining an action without proof that she was entitled to the daughter's services: *Smart v. Haig*, 12 U. C. C. P. 528; *Eidner v. Benneweis*, 24 O. R. 407. There is no onus on the mother to plead the death of the father: *Kelly v. Bull*, 23 U. C. R. 278; but see *Lake v. Bemiss*, 4 U. C. C. P. 430; *Ford v. Gourlay*, 42 U. C. R. 552.

(d) For case where sister allowed common law right of action, although mother living in province, see *Tweedlie v. Bogie*, 27 U. C. C. P. 561. For effect of mother's second marriage, see *Hogan v. Aikman*, 30 U. C. R. 14. The mother of an illegitimate daughter can maintain an action for her seduction only on the principles of the common law, but she is so far *in loco parentis* that damages may be given beyond the mere loss of service: *Muckleroy v. Burnham*, 1 U. C. R. 351; but see *Hicks v. Ross*, 25 U. C. R. 50, where the seduced was living with defendant.

(e) For cases of step-daughter see *Green v. Wright*, 24 U. C. R. 245; *McIntosh v. Tyrhurst*, 24 U. C. R. 443; 23 U. C. R. 565; *Smith v. Crooker*, 23 U. C. R. 84; *Waters v. Powers*, 29 U. C. R. 336; *Meyer v. Bell*, 13 O. R. 35. A widow is not an unmarried female within this section: *Kirk v. Long*, 7 U. C. C. P. 363; *Anderson v. Rannie*, 12 U. C. C. P. 536. The fact that the daughter gets married by the time of delivery appears to be no defence: *Ryan v. Miller*, 21 U. C. R. 202.

(f) While mere illicit intercourse affords no ground of action, proof of illness or physical disturbance sufficient to have caused loss of service to the parent, if the girl had been living with the parent, is all that is necessary: *Harrison v. Prentice*, 24 A. R. 677.

(g) Nor is it necessary that she should be living with her parent at the time of her subsequent illness: *Harrison v. Prentice*, 24 A. R. 677. The Statute of Limitations runs from the time of the seduction: *McKay v. Burley*, 18 U. C. R. 251.

(h) The brother of the girl is not within this section, and must prove service: *McKay v. Burley*, 18 U. C. R. 251. The father bringing an action does not need to plead the statute: *McLean v. Ainslie*, 5 O. S. 456.

Ontario.

provide for and retain her as an inmate a, then any other person who might at common law have maintained an action for the seduction may maintain such action" (b).

Sect. 3. "Any person other than the father or mother who by reason of the relation of master or otherwise would have been entitled at common law to maintain an action for the seduction of any unmarried female may still maintain such action if the father (c) or mother be not resident in Ontario at the time of the birth (d) of the child which is born in consequence of the seduction, or, being resident therein, does not bring an action for the seduction within six months from the birth of the child" (e).

Sect. 4 (by 62 Vict. c. 13, s. 1). "In case the father and mother of any unmarried female who has been seduced are both dead, and such unmarried female is under the age of twenty-one, any person who at the time of the birth of the child which is born in consequence of the seduction was the legal guardian of, or stood in *loco parentis* (f) to, such unmarried female may maintain an action for the seduction, notwithstanding that such unmarried female was at the time of her seduction serving or residing with another person upon hire or otherwise."

British
Columbia.

R. S. B. C. 1897, c. 52, s. 23, action for seduction not within jurisdiction of county court.

Alberta and
Saskatche-
wan.

Ord. N. W. T. 1903, c. 8 (Seduction).

Sects. 1, 2, and 3 as in the Ontario statute.

Sect. 4. "Notwithstanding anything in this ordinance an action for seduction may be maintained by any unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort, and on any such action she shall be entitled to such damages as may be awarded."

(a) Held, that the mere abandonment would not of itself divest the right of action though it should affect the damages: *James v. Hawkins*, 25 U. C. C. P. 346.

(b) There is no onus on the plaintiff to prove that the parents were absent or had failed to bring an action: *Nicholls v. Goulding*, 21 U. C. R. 306; or that they were dead: *Ford v. Gourlay*, 42 U. C. R. 552.

(c) The mother has a sufficient common law right to bring an action in the absence from the Province of the girl's father. This Act is an enabling Act enlarging the right of action under circumstances which at common law would not be sufficient: *Gould v. Erskine*, 20 O. R. 847. Although the residence abroad of the father has vested a right

of action in a master, the parent may sue for the seduction: *Cromie v. Skene*, 19 U. C. C. P. 328.

(d) The action can be brought by the parent even before the birth of the child: *Lesperance v. Duchene*, 7 U. C. R. 146; *Westcott v. Powell*, 2 E. & A. 525.

(e) See *Whitfield v. Todd*, 1 U. C. R. 223, as to effect of this enactment. Where the mother brought action within the six months, and the action abated owing to her death (after verdict had been set aside and before new trial took place), held that the master's right of action had been taken away by the statute.

(f) *In loco parentis*—husband of the girl's aunt; see *Abernethy v. McPherson*, 26 U. C. C. P. 516.

This last section is a bold experiment, giving as it does to **Alberta and** the person chiefly injured a right of action against her joint **Saskatche-** tort-feasor. It makes another exception to the rule *volenti non, wan.* &c.

R. S. M. 1902, c. 153 (The Seduction Act).

Manitoba.

Sect. 2. Same as s. 1 of the Ontario statute.

Sect. 3. Practically the same as s. 2, Ontario statute.

Sect. 4. Practically the same as s. 3, Ontario statute, but inserts the words "entitled to bring the same" after the words "father or mother."

It is provided that an action for seduction shall be tried by a jury (a), and that it is not in the jurisdiction of a county court (b).

C. S. N. B. 1903, c. 111, s. 160 (2), trial by jury preserved in **New** actions for seduction. **Brunswick.**

ACTION FOR CRIM. CON. (c).

See notes to Ch. I., *supra*, p. 39.

DAMAGES IN CASE OF ORDINARY SERVANT (d).

The measure of damages in an action for enticement of servants is not confined to the loss of services, but the jury may give ample compensation for all damages resulting from the wrongful act (e). **Ontario.**

DAMAGES IN ACTION FOR SEDUCTION (f).

The damages a master can obtain depends very much on the **Ontario.** position in his household of the person seduced (g).

BAD REPUTATION (h).

See *McMahon v. Skinner* (i); *McCreary v. Grundy* (k), to same **Ontario.** effect as English cases.

(a) R. S. M. 1902, c. 40, s. 59.

(b) R. S. M. 1902, c. 38, s. 60 (b).

(c) P. 227, *supra*.

(d) P. 229, *supra*.

(e) *Hewitt v. Ontario Copper Light-*
ning Rod Co., 44 U. C. R. 287.

(f) P. 229, *supra*. See *Ross v. Mer-*
ritt, 3 U. C. R. 60; *Fitzhenry v. Murphy*,
14 C. L. J. 22; *Hope v. Davidson*, 33

U. C. R. 550, cases where Court refused
to interfere.

(g) *Ford v. Gourlay*, 42 U. C. R. 552.
See *Paterson v. Wilcox*, 20 U. C. C. P.
385, distress of mind.

(h) P. 230, *supra*.

(i) 2 U. C. R. 272.

(k) 39 U. C. R. 316.

CHAPTER XI.

TRESPASS TO CHATTELS AND CONVERSION.

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Injuries to
chattels.

Physical
damage.

Asportation.

IN dealing with rights of action arising out of injuries done to property movable and tangible in its nature, there are two main things to be considered: first of all, the nature of the wrongful act; secondly, the nature of the right or interest which is infringed by such act. It is clear that he who actually damages a chattel belonging to another, whether indirectly by reason of his negligence, or directly by some act done to the chattel in the nature of a trespass, is guilty of a wrong. Where a cab-driver had deposited his licence with his employer and the latter on discharging him from his service indorsed his reasons for so doing on the licence without any authority, it was held that there was a good cause of action, and that it was no defence to plead the truth of the indorsement (a).

There may be a trespass without the infliction of any material damage by a mere taking or asportation. The removal of a chattel from one room to the other without any authority, express or implied from the circumstances (b), may be a good cause of action, although but for nominal damages (c). It is

(a) *Rogers v. Maconmara*, (1853) 14 C. B. 27; see *Hurrell v. Ellis*, (1845) 2 C. B. 295; *Wennhak v. Morgan*, (1888) 20 Q. B. D. 635; *Norris v. Birch*, (1895) 1 Q. B. 639.

(b) As where property derelict or endangered is taken with the intention of

preserving it for the owner, see *per* Coke, C.J., *Isaack v. Clarke*, (1613) 2 Buls. p. 312; *per* Pollock, C.B.; *Reg. v. Riley*, (1853) Dears, C. C. p. 157; *Kirk v. Gregory*, (1876) 1 Ex. D. 55.

(c) *Kirk v. Gregory*, *supra*.

apprehended, however, that for a taking to constitute a trespass it must not merely be an unlawful act but unlawful as against the party from whom possession is taken. Thus, if goods belong to A., and B. being unlawfully possessed of them transfers them to C., the taking of them by C., though it may give a good cause of action in trover, is not a trespass (a). And it makes no difference, it would seem, if C. is aware of the infirmity of B.'s title. The receiver of stolen goods does not commit a trespass when he takes the goods from the thief with the thief's consent. If it were otherwise every receiver might be indicted for larceny.

When aspor-
tation no
trespass.

Formerly if a sheriff seized goods under an execution and it turned out ultimately that the execution debtor had previously committed an act of bankruptcy, and that consequently his assignees in bankruptcy acquired a title by relation to the goods seized in the execution, they might sue the sheriff in trover for the value of the goods, but they could not treat him as a trespasser, because his act was not wrongful as against the debtor from whose possession the goods were taken. But it was different where the original taking was, in every sense, unauthorised, for in such case mere title by relation would enable the party possessing it to maintain an action of trespass. Thus an administrator may sue for an illegal distress made between the death of his intestate and the grant of letters of administration (b).

There may sometimes be an unlawful taking of a chattel although the trespasser has it in his physical custody and control. Formerly (c), a bailee could not be indicted for larceny merely because he dishonestly converted to his own use the subject-matter of a bailment. He did not interfere with the possession, and there was consequently no trespass and no larceny. But if he "broke bulk," that is to say, abstracted from the bale, barrel, or parcel, as the case might be, a portion of its contents, he committed a trespass and was indictable for larceny.

Taking
without
change of
possession.

The most important class of cases to consider is that in which the person entitled to the possession of a chattel is permanently

Conversion.

(a) See *Mennie v. Blake*, (1856) 6 E. & B. 842; *Winter v. Banks*, (1901) 84 L. T. 504.

(b) *Tharpe v. Stallwood*, (1843) 5 M. & G. 760; explaining *Balme v.*

Hutton, (1833) 9 Bing. 471.

(c) Larceny by a bailee was first made an offence by 20 & 21 Vict. c. 54, s. 4, re-enacted by 24 & 25 Vict. c. 96, s. 3.

deprived of that possession, and the chattel is *converted* to the use of some one else. Here the wrong is not done to the thing itself but to the abstract right in the thing.

It may of course happen that the one wrong will involve the other. If A. takes the chattel of B. from him he commits an act of trespass, if he takes it and keeps it he is guilty of both trespass and conversion (a). A man may, however, be deprived of his property by many other means than a wrongful taking, as for instance, by a wrongful detention.

Remedies for
deprivation
of possession.

Apart from trespass, there were at common law three forms of remedy open to the person who had been tortiously deprived of his goods. He might proceed by trover, detinue or replevin.

Trover and
conversion.

The action of trover, according to the original form of declaration, was applicable only to cases where the plaintiff had lost his goods and they were subsequently found and appropriated by the defendant. However, the averments of loss and finding had long been considered immaterial, and were not traversable by the defendant.

Lord Mansfield thus describes the action of trover: "In form it is a fiction, in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully into the possession of the goods. The action lies, and has been brought in many cases where in truth the defendant has got the possession lawfully. Where the defendant takes them wrongfully and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass and admits the possession to have been lawfully gotten" (b). It will be seen afterwards, however, that the mere unlawful taking may of itself be a good cause of action in trover. By the first Common Law Procedure Act (c) the fictitious averments were abolished, and by the form of declaration given it was simply alleged that "the defendant converted to his own use or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods" (d). These alternative allegations are in truth

(a) See below, pp. 234, 235, *Fouldes v. Willoughby*, (1841) 8 M. & W. 540.

(b) *Cooper v. Chitty*, (1756) 1 Burr. p. 31.

(c) 15 & 16 Vict. c. 76, s. 49.

(d) It is said that this alternative allegation was in reality intended as a substitute for the first, and that the two

exactly equivalent to one another, and it is the latter that most correctly describes the nature of the action, since the plaintiff sues in respect of the loss of goods which he has suffered, irrespective of any particular appropriation of them which may have been made by the defendant (a). The word conversion, however, is the recognised legal expression for the wrongful deprivation of the possession of goods, and its use in this artificial and fictitious sense has now probably become inveterate (b).

An act of conversion may be committed, (1) when property is wrongfully taken, (2) when it is wrongfully parted with, (3) when it is wrongfully sold in market overt although not delivered, (4) when it is wrongfully retained, and (5) when it is wrongfully destroyed.

1. Any one who without authority takes possession of another man's goods with the intention of asserting some right or dominion over them is *primâ facie* guilty of a conversion. It has, however, been said that a person who seeks to acquire some property in a chattel not being aware of the title of the true owner is not guilty of a conversion by the mere fact of taking possession. This question is discussed later on (c).

Conversion
by taking.

A mere taking unaccompanied by an intention to exercise permanent or temporary dominion may be a trespass, but is no conversion. In *Fouldes v. Willoughby* (d) the plaintiff had embarked in the defendant's ferry-boat two horses, and had paid for their passage. Subsequently the latter without justification refused to carry out his contract and desired the plaintiff to remove the horses from the boat, which the plaintiff refused to do. The defendant then took them from the plaintiff and turned them loose on the landing-place. At the trial the jury were directed that by so doing he was guilty of a conversion. It was held that this was a misdirection, because the jury ought to have been asked to consider what the intention of the defendant had been, whether he had intended to get rid of the horses from his boat or to assert any right or dominion over them. "It has never yet been held that

Intention to
exercise
dominion.

were printed together by an oversight ; see Day, C. L. P. Acts, p. 185.

(a) See *Keyworth v. Hill*, (1820) 3 B. & Ald. 685.

(b) See *per* Bramwell, L.J., *Glyn v. East India Dock Co.*, (1880) 6 Q. B. D. p. 490 ; *Burroughes v. Bayne*, (1860) 5

H. & N. p. 309 ; *England v. Cowley*, (1873) L. R. 8 Ex. p. 129 ; *Hiort v. Bott*, (1874) L. R. 9 Ex. p. 89.

(c) See below, p. 253 ; and *Spackman v. Foster*, (1883) 11 Q. B. D. 99.

(d) (1841) 8 M. & W. 540 ; see also *Houghton v. Butler*, (1791) 4 T. R. 364.

the single act of removal of a chattel independent of any claim over it, either in favour of the party himself or any one else, amounts to a conversion of a chattel. In the present case, therefore, the simple removal of the horses by the defendant for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them is no conversion " (a).

Need not be
intention
to acquire
ownership.

The taking need not be with the intention of acquiring a full ownership. It is enough if any interest is claimed inconsistent with the right of the person truly entitled. In *Tear v. Freebody* (b) the defendant wrongfully took possession of certain goods, with the intention of acquiring a lien, and it was held that he was guilty of a conversion. Even a still more transitory exercise of dominion may, it would seem, amount to a conversion. "If a man takes my horse and rides it and then redelivers it to me nevertheless I may have an action against him, for this is a conversion, and the redelivery is no bar to the action but shall be merely a mitigation of damages" (c). Any asportation of a chattel for the use of the defendant or a third party amounts to a conversion " (d). If therefore a man takes and uses the chattel of another in an unauthorised manner, and without further default on his part it is lost, injured, or destroyed before it can be returned to the owner, he is liable for the whole damage.

Constructive
taking.

The taking may be constructive merely, as by a transfer on the books of a warehouseman or an indorsement of a document of title (e). But a man does not convert goods simply by making a contract for their purchase; the conversion takes place on the acceptance of delivery of the goods or of the document which represents them. A broker, so long as he confines himself to his regular business as a medium of communication between the

(a) *Per* Lord Abinger, p. 547. The distinction between trespass and conversion, although in many respects now unimportant, may be very material on the question of damages.

(b) (1858) 4 C. B. N. S. 228.

(c) Rolle Ab. tit. Action sur Case, p. 5.

(d) *Per* Alderson, B., *Fouldes v. Willoughby*, (1841) 8 M. & W. p. 548. See *per* Holt, C.J., *Petre v. Heneage*, (1701)

12 Mod. p. 520; *Mulgrave v. Ogden*. (1590) Cro. Eliz. 219.

(e) *M'Combie v. Davies*, (1805) 6 East. 538. So there may be a conversion if goods are constructively parted with (*Hiort v. Bott*, (1874) L. R. 9 Ex. 86; *Johnson v. Stear*, (1863) 15 C. B. N. S. 330; and see *Union Credit Bank v. Mercury Docks & Harbour Board*, (1899) 2 Q. B. 205.

parties, is unaffected by the lack of lawful authority in his principals to deal with the goods which are the subject-matter of the contract. But if he does something more than make the contract, if the goods themselves or the document representing them pass through his hands and he actively intervenes in the transfer of possession, then if that transfer is unlawful he becomes himself a wrong-doer (a).

If a man takes possession of premises on which goods are deposited, it is a question for the jury whether it was his intention also to take possession of the goods themselves. In *Thorogood v. Robinson* (b) the defendant had entered on some land under a writ of possession. He found there two men loading on a barge some lime which was the property of the plaintiff. He turned them off, and refused to let them complete the loading or remove any of the lime. The plaintiff thereupon sued in trover. The jury were asked to consider whether there had been any act indicating an intention to deprive the plaintiff of his property, and if they thought not, to give a verdict for the defendant. It was held that this direction was at least sufficiently favourable to the plaintiff, and some of the Court seem to have doubted whether there was any evidence at all of a conversion (c). Nor does a forcible taking possession of premises, under an assignment of lease, and subsequent refusal to deliver up fixtures contained therein amount to a conversion of the premises (d).

By taking possession of premises.

In *Grainger v. Hill* (e) the defendants obtained from the plaintiff, under threat of executing a warrant of *ca. sa.*, a ship's register, and it was held this amounted to an act of conversion because they had taken it without right, and against the plaintiff's will. But it is not enough if property is surrendered under a threat of

Taking by duress.

(a) See *Hollins v. Fowler*, (1874-5) L. B. 7 H. L. 757. The point was not finally decided in this case by the House of Lords because they held that the defendant (plaintiff in error) had taken possession of the goods as a principal. The statements in these last two paragraphs may seem opposed to the opinion of Brett, J. (pp. 775 *et seq.*), but it is apprehended that his observations, though perfectly general in form, were only intended to apply to the case of an

agent dealing with goods in ignorance of the true title. This case is dealt with below, p. 251; see also *Barker v. Furlong*, (1891) 2 Ch. 172.

(b) (1845) 6 Q. B. 769.

(c) See *Wilde v. Waters*, (1855) 24 L. J. C. P. 195, cited below, p. 244, n. (a); *Wandsbrough v. Maton*, (1836) 4 A. & E. 884, see below, p. 246.

(d) *Longstaff v. Mago*, (1834) 2 A. & E. 167.

(e) (1838) 4 Bing. N. C. 212.

unpleasant consequences. There must be such duress as to be equivalent to a forcible taking (a).

Conversion
by parting
with goods.

2. A plaintiff who sues for conversion and relies on the fact that the defendant unlawfully parted with the possession of his goods gives the go-by to the question whether that possession was originally acquired wrongfully or innocently; for the moment he is content to treat it as lawful. The defendant on this assumption cannot be guilty of any wrong by merely giving a temporary custody to some servant or agent, since by so doing he does not alter his position (b). The wrongful act is done when he purports to give to some stranger, along with the mere possession, some right over the property itself, whether as owner or *dominus pro tempore*. The taking and the giving are, in fact, whether actual or constructive, the different sides of one unlawful transaction, and the transferor and the transferee may be considered as joint wrong-doers.

It is therefore clear that any one who under a contract of sale hands over property in a manner adverse to the right of the person really entitled is guilty of a conversion (c). And it would seem to make no difference whether he is the actual vendor or merely entrusted with the property for the purpose of sale as a commission agent or auctioneer (d).

In the latter case, however, the mere fact of an auctioneer submitting goods for sale raises a legal presumption that he is authorised to sell. Consequently, although he may have innocently exceeded his authority by so doing, he is nevertheless liable to a *purchaser*, as distinguished from a *bidder*, for loss of bargain (e).

Intention to
confer special
property.

As the unauthorised taking of goods with the intent of thereby asserting a lien or special property is a conversion, so it is a

(a) *Powell v. Hoyland*, (1851) 6 Ex. 67.

(b) *Canot v. Hughes*, (1836) 2 Bing. N. C. 448.

(c) *Martindale v. Smith*, (1841) 1 Q. B. 389.

(d) *Featherstonhaugh v. Johnstone*, (1818) 8 Taunt. 237; *Cochrane v. Rymill*, (1879) 40 L. T. N. S. 744; *Delaney v. Wallis*, (1883) 14 L. R. Ir. 31; *Barker v. Furlong*, (1891) 2 Ch. 172; *Consolidated Co. v. Curtis*, (1892) 1 Q. B.

425. Cp. *National Mercantile Bank v. Rymill*, (1881) 44 L. T. N. S. 767. The case of *Turner v. Hockey*, (1887) 56 L. J. Q. B. 301, if it is to be taken as deciding anything contrary to what is stated in the text above, is not good law. It has been dissented from both in *Barker v. Furlong* and *Consolidated Co. v. Curtis*.

(e) *Anderson v. Croall*, (1903) 6 F. 153, Ct. of Sess.

conversion if a man hands over goods to another so as to give him a lien or special property. "If a person take my horse to ride and leave him at an inn that is a conversion; for though I may have the horse on sending for him and paying for the keeping of him, yet it brings a charge on me" (a).

Any one who finding himself in possession of goods hands them over to another takes on himself the risk that such person may have no right to receive them; for if so, he has made himself a party to an unauthorised transfer of possession. In *Hiort v. Bott* (b), the plaintiffs, in consequence of a telegram from their agent, consigned certain barley to the defendant, and sent him a delivery order on production of which he was entitled to receive the barley from the carriers. The defendant had, in fact, ordered no barley. The agent called on him next day and said that it was a mistake. The defendant thereupon by way of setting matters right, and believing that he was in effect returning the barley to the plaintiffs, indorsed over the delivery order to the agent, who thereby obtained the barley and absconded with the proceeds. It was held that the defendant was liable for a conversion, since he had in effect parted with the plaintiffs' property to a person who had no right to receive it.

Assisting in
unlawful
transfer.

It is the duty of a carrier or warehouseman to deliver the goods with which he is entrusted to the person designated by his employer, and, as a general rule, a misdelivery is a conversion (c). The duty, however, is not absolute; it is enough if a reasonable and usual course of business is followed, and where there is no breach of duty there can be no conversion (d).

Misdelivery
by carrier or
warehouse-
man.

Therefore if bills of lading in more than one part have been given for goods shipped on board a vessel and the first part is indorsed over for value, the master may nevertheless deliver the goods to the holder of one of the other parts who first presents

(a) *Per* Buller, J., *Syeds v. Hay*, (1791) 4 T. R. p. 264.

(b) (1874) L. R. 9 Ex. 86.

(c) *Detereux v. Barclay*, (1819) 2 B. & Ald. 702; *Stephenson v. Hart*, (1828) 4 Bing. 476; *Hiort v. London & North Western R. Co.*, (1879) 4 Ex. D. 188. See, however, the observations of Martin, B., *Crouch v. Great Northern R. Co.*,

(1856) 11 Ex. pp. 756-7. For effect of the estoppel raised by attornment, see *Henderson v. Williams*, (1895) 1 Q. B. 521.

(d) *Heugh v. London & North Western R. Co.* (1870) L. R. 5 Ex. 51; *M'Kean v. M'Ivor*, (1870) L. R. 6 Ex. 36.

himself, provided he has no notice of the right of the indorsee for value (a).

Goods lost or destroyed.

There can be no conversion where there is no voluntary act. Therefore if goods are by accident or carelessness lost or destroyed the bailee or other possessor cannot be sued in this form of action. He may be liable on his contract, or for negligence (b), or in detinue (c).

And where goods are given into the sole custody of a person and accepted by him as a bailee, should they be lost while in his custody, the onus lies on him to show circumstances negating negligence on his part (d).

Apparently, however (apart from special agreement), a bailee is not liable to his bailor for damage to the chattel bailed when such damage was caused by the bailee's servant negligently doing some act, resulting in damage to the chattel, that was not within the scope of his employment (e).

Duty of distraining landlord.

A landlord who has removed goods under a distress is not bound to hand over the surplus which may remain after he has sold sufficient to satisfy his rent to the true owner, even if he have notice of his claim. He has a legal right over them derived from the fact of their being found on the demised premises, and in the exercise of this right is not bound to concern himself with questions of title (f).

Conversion by sale in market overt.

3. Unless it be in market overt, there can be no conversion by a mere bargain and sale without a transfer of possession; such an act is void and does not change the property or the possession (g); but in market overt the property is passed to the purchaser by the sale, which is therefore equivalent to physical destruction, and the vendor is liable in trover to the true owner (h) though the goods be never delivered to the purchaser in pursuance of such sale.

(a) *Glyn, Mills & Co. v. East & West India Dock Co.*, (1880-2) 7 App. Cas. 591.

(b) *Ross v. Johnson*, (1772) 5 Burr. 2825; see *Heald v. Carey*, (1852) 11 C. B. 977.

(c) See below, p. 254.

(d) *Phipps v. New Claridge's Hotel, Ltd.*, (1905) 22 T. L. R. 49.

(e) *Sanderson v. Collins*, (1904) 1 K. B. 628, C. A.

(f) *Erans v. Wright*, (1857) 2 H. & N. 527; *Yates v. Eastwood*, (1851) 6 Ex 805.

(g) *Lancashire Waggon Co. v. Fitzhugh*, (1861) 6 H. & N. 502; *Consolidated Co. v. Curtis & Son*, (1892) 1 Q. B. p. 498, per Collins, J.

(h) See per Parke, B., in *Farrer v. Beswick*, (1836) 1 M. & W. p. 688; *Delaney v. Wallis*, (1885) 14 L. B. Ir. 31.

4. The ordinary way of showing a conversion by unlawful retention of property is to prove that the defendant having it in his possession refused to give it up on demand made by the party entitled. But this demand must be for specific chattels, where therefore a plaintiff entitled to claim five best beasts as heriots marked seven and allowed all to remain in the custody of the defendant; a general demand by the plaintiff for the heriots, without specifying the particular beasts claimed by him, would not support an action for the conversion of any one of them (a). It is not, however, necessary that at the time of the demand made the defendant should be so far in a position to return the property, that he has it in his custody or under his control. If he has been in possession but has previously destroyed it or parted with it voluntarily, such dealing amounts to a conversion, and the plaintiff, after demand and refusal, is entitled to sue the defendant in detinue (b). If, however, the goods in question are actually seized under a legal process while in the defendant's possession, he is not answerable in trover because he does not do what is out of his power and deliver them on demand (c). It not unfrequently happens that by the defendant's language or conduct at the time of the demand he expressly or impliedly admits that he could return them if he thought fit. In *Catterall v. Kenyon* (d), an action was brought against an innkeeper and his wife. Certain cattle of the plaintiff wrongfully taken in execution had been left in a stable of the inn. The plaintiff demanded them several times of the wife, who after some negotiation finally refused to hand them over, on the ground that she had received an indemnity. It was held that this was good evidence of possession and a conversion by the wife, for which both husband and wife, by reason of the relation existing between them, were answerable to the plaintiff in trover (e).

Conversion
by keeping.
Demand and
refusal.

(a) *Abington v. Lipscomb*, (1841) 1 Q. B. 776.

(b) *Wilkinson v. Verity*, (1871) L. R. 6 C. P. 206. As will be seen where the defendant is under a contractual duty to return a chattel which is not in his possession, he is liable in detinue if he, contrary to the terms of his contract, fails to return it on demand. See

below, p. 255.

(c) *Verrall v. Robinson*, (1835) 2 C. M. & R. 495, explained *Pillott v. Wilkinson*, (1864) 3 H. & C. 345.

(d) (1842) 3 Q. B. 810.

(e) See, too, *M'Kewen v. Cotching*, (1857) 27 L. J. Ex. 41, for implied admission of a possession and destruction.

wine warehoused with the defendant, and was the indorsee of the warrant. He called at the warehouse to demand possession, and was told by a clerk, as was the fact, that notice of an attachment of the wine had been served out of the Mayor's Court, and that consequently there was a difficulty about the matter. The plaintiff then went to look for the defendant, but not finding him, sent a letter to intimate that unless he received a satisfactory answer by next morning he should take proceedings. In reply the defendant wrote requesting further time for consideration, and thereupon a writ was issued. The plaintiff having obtained a verdict, the Court below and the Exchequer Chamber refused to order a new trial (a), it being a question for the jury whether the defendant had a *bonâ fide* doubt as to the plaintiff's right of possession, and whether a reasonable time had elapsed for clearing up such doubt (b).

Responsi-
bility on
qualified
refusal.

It would seem that if a defendant has given a qualified refusal, it becomes his duty, after reasonable opportunity of enquiry and consideration, to hand over the goods, and he cannot excuse himself when the time has come by showing that in the interval they have passed out of his control, at any rate, if there has been any default on his part. In *Burroughes v. Bayne* (c) the defendant had seized certain furniture under a bill of sale by putting a man in possession. The plaintiffs claimed a billiard table, which was part of the furniture. The defendant asked time to consider. Two days later the plaintiffs sent for their billiard table, having previously given notice of their intention to do so; but they were unable to obtain possession as it was locked up in a room. This had not been done by the defendant's authority, as he had in effect given up his claim and withdrawn from possession. Bramwell, B., held that there was no evidence of a conversion, because the plaintiffs had agreed to the first delay, and, subsequently on the second demand, the defendant had no control over the table or responsibility for it. The majority of the Court, however, decided that as the defendant had had an opportunity of handing over the table and delayed doing so for

(a) Bramwell, B., *diss.*

18 C. B. 599.

(b) See, too, *Vaughan v. Watt*, (1840)
6 M. & W. 492; *Lee v. Bayes*, (1856)

(c) (1860) 5 H. & N. 216.

his own purposes, he had taken on himself the duty of carrying out the delivery on a subsequent occasion (a).

A demand and refusal is not the only evidence of an unlawful keeping. There may be a conversion of a chattel by the use and enjoyment of it in a manner altogether inconsistent with the right of the owner. Thus if a person is entrusted with the custody of a cask of wine, and bottles the wine for his own consumption, it would seem there is some evidence of a conversion, even though none of the liquor be actually drunk (b).

Other
evidence of
unlawful
keeping.

In *Falk v. Fletcher* (c) the plaintiff having shipped a certain portion of a cargo on board the defendant's vessel, disputes arose, and the master subsequently refused to give the plaintiff bills of lading in his own name and sailed on his voyage, and ultimately refused to deliver the goods to the plaintiff's agent at the port of destination. It was held that there had been a conversion when the ship sailed away. But in a later case (d) where the master had refused to sign bills of lading except in a certain form, and sailed away, but subsequently made a proper tender of the cargo to the plaintiff at the port of destination, it was held that though the master had committed a breach of contract by not giving bills of lading, yet he had not been guilty of a conversion, because he had always held the goods for the plaintiff; whereas in *Falk v. Fletcher* there had been a repudiation of the rights of the owner of the cargo in the very inception of the voyage.

In the recent case of *Turner and Another v. Hagi Goolam Mahomed Azam* (e), where, though no allegation of a conversion was made, the refusal to deliver seems to have amounted to one,

(a) It is suggested by Maule, J. (*Wilde v. Waters*, (1855) 24 L. J. C. P. p. 195), that under certain circumstances a man may be in possession of a chattel without title, and yet not be bound to deliver it on the demand of the owner. Where an outgoing tenant leaves a picture hanging on a wall, the new tenant may refuse to admit the owner of the picture to take it, and may not choose to put himself to the trouble of giving it, but the picture is still the owner's chattel. The question in such a case would be whether the jury could infer from the refusal that the new

tenant exercised any dominion over the chattel. If it appeared that he had merely said, 'I don't want your chattel, but I shall not give myself any trouble about it,' that would not give the owner an action of trover." The view here expressed, however, seems inconsistent with *Thorogood v. Robinson*, (1845) 6 Q. B. 769; see above, p. 236.

(b) *Philpott v. Kelley*, (1835) 3 A. & E. 106.

(c) (1865) 18 C. B. N. S. 403.

(d) *Jones v. Hough*, (1879) 5 Ex. D. 115.

(e) (1904) A. C. 826, P. C.

Actions
between
co-owners.

If two or more people own a chattel either jointly or in common, one of them cannot bring an action against the others merely for an interference with his right of possession, since the possession of each is alike lawful, and the manner of its exercise is left by the law to be settled among the parties themselves (a). Although there is apparently no "rule of law which would debar the other co-owner from bringing an action for that conversion," if the particular facts of the case show that (b) one co-owner has deprived the other of all possible use and enjoyment of the property, either in the present or the future, then he has been guilty of an act of conversion. "It is well established that one tenant in common cannot maintain an action against his companion unless there has been a destruction of the particular chattel or something equivalent to it" (c). Short, therefore, of "destruction or something equivalent," one co-owner may exercise the full rights of property over a chattel in defiance of the wishes of the other co-owners, without being guilty of a tort. He may destroy its identity by the process of manufacture (d); he may create a lien on it (e); he may sell it otherwise than in market overt (f). And this immunity extends to those who stand in his shoes. If a sheriff seizes partnership property under an execution against one of the firm, he becomes part owner, and this part ownership protects him, even though he purports to sell the entire interest in the goods (g). But where by arrangement between two co-owners it was agreed that one of them should have exclusive possession of a chattel, and the other having obtained temporary possession unlawfully pledged it, the first successfully maintained an action against the pledgee in respect of his exclusive right of possession (h). If co-owners jointly pledge property, and one of them without the authority of the other afterwards demands the property back tendering the

(a) Co. Litt. p. 200a.

(b) *Poisson v. Robertson and Another*, (1902) 86 L. T. 302.

(c) *Per Parke, B., Morgan v. Marquis*, (1854) 9 Ex. p. 148.

(d) *Fennings v. Lord Grenville*, (1808) 1 Taunt. 241; *Jacobs v. Seward*, (1872) L. R. 5 H. L. 464.

(e) *Jones v. Brown*, (1856) 23 L. J. Ex. 345.

(f) *Mayhew v. Herrick*, (1849) 7 C. B. 229. In *Barton v. Williams*, (1822) 3 B. & Ald. 395, some of the judges held that a mere sale might be an act of conversion as between two co-owners, but this has been repeatedly disapproved of.

(g) *Mayhew v. Herrick*, *supra*.

(h) *Nyberg v. Handelaar*, (1892) 2 Q. B. 202.

amount due, the pledgee is not guilty of a conversion by refusing to deliver (a). And if a bailee receive a deposit from joint bailors, in the absence of a special contract to deliver only to a joint application, a plea of delivery to one bailor is a sufficient answer to an action for conversion by the others (b).

A sale in market overt by one co-owner without authority from the other is "equivalent to a destruction," because it transfers the property and entirely defeats the interests of the non-consenting party, who therefore would be altogether without remedy unless he might sue his companion (c). And although an ordinary taking or selling may not be a conversion, yet if the result is, even as a somewhat remote consequence, that it becomes impossible for the property to be restored, an action of trover will lie. This appears from the case of *Barnardiston v. Chapman* (d). The plaintiff was the tenant in common of one moiety of a ship, the defendants tenants in common of the other moiety. The defendants forcibly took a ship out of the plaintiff's possession, secreted it from him, changed the name, and afterwards handed it over to a third party, who sent it on a voyage, in the course of which it became a total loss. It was left to the jury to say whether there had not been a destruction by the defendants' means, and they having found for the plaintiff the Court refused to disturb the verdict.

Destruction
of interest of
co-owner.

The question not unfrequently arises in actions of trover how far the defendant's ignorance of the unauthorised character of his act can be relied upon as a defence. In most cases of conversion—not in all, as for instance where there is conversion by destruction—there are two elements, first of all a dealing with the goods in a manner inconsistent with the right of the person entitled to them; secondly, an intention in so doing to deny his right or to assert a dominion which is in fact inconsistent with such right. Ignorance of the right will not affect the quality of the act done,

Defendant's
ignorance of
plaintiff's
title.

(a) *Harper v. Godsell*, (1870) L. R. 5 Q. B. 422; see *Atwood v. Ernest*, (1853) 13 C. B. 881, a case of detinue; see also *Wright v. Robotham*, (1886) 33 Ch. D. 106.

(b) *Broadbent v. Ledward*, (1839) 11

A. & E. 209.

(c) *Per Parke, B., Farrar v. Beswick*, (1836) 1 M. & W. p. 688.

(d) Cited *Heath v. Hubbard*, (1803) 4 East, p. 121; see, too, *Mayhew v. Her- rick*, (1849) 7 C. B. 229.

but it may have a material bearing on the question of intention. If a man taking a flock of sheep from a market by mistake drives among them a sheep which does not belong to him, it is a trespass, for it is an asportation of a chattel without the owner's consent (a), but it is not, it is apprehended, a conversion, for there is no intention to assert dominion over that particular sheep or to interfere with the right of the true owner.

Agents.

It is principally in considering the liability of agents in dealing with goods that it becomes material to enquire into their knowledge of the true ownership. Where a man deals with goods as principal an intention to exercise dominion may be generally inferred from the nature of the act itself, but such inference does not equally arise in the case of an agent who acts on his instructions without necessarily knowing what the intention of his principal is.

Exercise of dominion in right of self.

(a) A defendant is always liable if "he has taken the goods as his own, or used them as if they were his own" (b). The rule is that "persons deal with property in chattels or exercise dominion over them at their peril" (c). On this principle it was decided in *M'Combie v. Davies* (d) that a defendant who innocently took goods in pledge from a person wrongfully dealing with them was liable in trover at the suit of the real owner. Where, however, a *mercantile agent* is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent to a person taking under the disposition in good faith, shall, subject to the provisions of the Factors Act, 1889 (even though in fraud of the true owner), be as valid as if he were expressly authorised by the owner of the goods to make the same. It is also provided by s. 25 (sub-s. 2) of the Sale of Goods Act, 1893, that where a person (other than a factor) having bought, or agreed to buy, goods obtains possession of them with the consent of the seller, any subsequent sale of the goods (though fraudulent) to a

(a) *Reg. v. Riley*, (1853) 1 Dears & Pearce C. C. 149.

(b) *Per Brett, J., Fowler v. Hollins*, (1872) L. R. 7 Q. B. p. 627.

(c) *Per Cleasby, B., ibid.* p. 639.

(d) (1805) 6 East, 548. See, however, the *dictum* of Bramwell, B. (*Burroughes v. Bayne*, (1860) 5 H. & N. p. 310); and of Coleridge, J., in *Mennie v. Blake*, (1856) 6 E. & B. p. 851.

purchaser in good faith and without notice, shall absolutely vest the property in such purchaser.

(b) When a person, though only as agent, takes part in a transaction which purports to effect a transfer of property in a chattel, and it turns out that his principal had no title, his ignorance of this fact does not protect him, for he has clearly intended an act which is inconsistent with the right of the true owner. Thus, where the defendant's employer had bought goods of a bankrupt, and the defendant not knowing of the bankruptcy took delivery of the goods and forwarded them, it was held that he was liable in trover to the assignees of the bankrupt (a). "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless, his acts may amount to a conversion, for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it" (b). So, formerly, if a sheriff seized and sold under an execution, and the debtor had then committed a secret act of bankruptcy on which he was afterwards adjudicated bankrupt, the assignees might sue the sheriff for the conversion of the bankrupt's goods (c). So, if an auctioneer sells goods and hands over the proceeds to his principal without notice of any defect in his title, the true owner may recover from him the value over again (d).

(c) If an agent intermeddles merely with the custody of a chattel in ignorance of his principal's lack of title, and also in ignorance that any alteration of property is intended, he is not guilty of a conversion. "The true proposition as to possession and detention and asportation seems to be that a possession or detention which is a mere custody or mere asportation made without reference to the question of the property in goods or chattels is not a conversion" (e). On this principle a forwarding agent who packs and ships goods does not render himself liable

On behalf
of another.

Agent not
intending
to alter
property.

(a) *Stephens v. Elwall*, (1815) 4 M. & S. 259.

(b) *Per* Lord Ellenborough, p. 261.

(c) *Garland v. Carlisle*, (1837) 4 Cl. & F. 693. Now, however, the sheriff in such cases is protected: 46 & 47 Vict. c. 52, ss. 45, 46.

(d) *Cochrane v. Rymill*, (1879) 40 L. T. N. S. 744; see below, p. 252, and see *The Consolidated Co. v. Curtis*, (1892) 1 Q. B. 495; 61 L. J. Q. B. 325.

(e) *Per* Brett, J., *Fowler v. Hollins*, (1872) L. R. 7 Q. B. p. 630

because his employer had no title (a), apparently upon the ground that the act of the forwarding agent is so purely ministerial that, if performed in good faith and without notice, no presumption of a conversion can be raised therefrom. So, a carrier who receives goods and delivers them in accordance with the directions of the consignor, without notice of any adverse title, is free from responsibility (b). This case of the carrier has been put on the special ground that he exercises a public employment and has no choice as to refusing or accepting goods. But it is really only an exemplification of the wider principle. Even a common carrier, if he knowingly assisted at a transfer of property, might be answerable, just as the sheriff was in *Garland v. Carlisle*, though he, too, was bound to perform his public duty.

Lord
Blackburn's
view.

The principle is explained by Blackburn, J., in *Hollins v. Fowler* (c) in the following manner. After pointing out that originally the action of trover assumed a possession by finding, innocent in the first place, on the part of the defendant, he says: "I cannot find it anywhere distinctly laid down, but I submit to your lordships that on principle one who deals with goods at the request of a person who has the actual custody of them in the *bonâ fide* belief that the custodier is the true owner or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession if he was the finder of goods or entrusted with their custody." Accordingly, if a farrier shoes a horse and sends it home, if a warehouseman stores goods and then returns them, if a carter shifts furniture from one house to another—in none of these cases will the agent or bailee be liable simply because his principal or bailor had no right over the goods.

Lord Esher's
view.

On the other hand, in the application of the principle that an asportation without reference to the question of the property is no conversion, Brett, J. (d), in the same case took a view much more favourable to the agent. He thought that an agent who

(a) *Greenway v. Fisher*, (1824) 1 C. & P. 190.

(b) See *per Willes, J., Sheridan v. New Quay Co.*, (1858) 4 C. B. N. S. p. 650; *per Martin, B., Fowler v. Hollins*, (1872)

L. R. 7 Q. B. p. 632.

(c) (1874-5) L. R. 7 H. L. pp. 766-7.

And see *per Cave, J., M'Entire v. Potter*, (1889) 22 Q. B. D. p. 441.

(d) L. R. 7 H. L. pp. 779—785.

forwarded goods on behalf of his principal to a purchaser, though with the object of carrying out the sale, did so without reference to the question of property (a).

An auctioneer who sells and delivers in the ordinary course is more than a mere broker or intermediary, and more than a packer or carrier of goods who merely purports to change the position of the goods and not the property in them; if he receives goods for sale, and on selling them hands them over with the view of passing the property in them, he will be liable for conversion if the vendor had no title (b). But an auctioneer may act as a mere broker, confining himself to the negotiation of the sale, and leaving his principal to deliver possession, in which case his act is no conversion (c).

Auctioneer
selling and
delivering.

Selling
without
delivering.

In *National Mercantile Bank v. Rymill* (d) the plaintiffs were the holders of an absolute bill of sale whereby one Seaman assigned to them *inter alia* certain horses and harness. Seaman afterwards, without the knowledge of the plaintiffs, took the horses and harness to the defendant's repository and entered them for sale in his books, and they were catalogued for sale by auction on the following day. Before they were put up for auction, Seaman sold them privately to Townsend, who paid the purchase-money to the defendant, and the latter after deducting his commission paid the balance to Seaman, and ordered the delivery of the horses and harness to Townsend. It was held, that as there was no sale by Rymill he was not guilty of a conversion, and the case was therefore distinguished from *Cochrane v. Rymill* (e), where the defendant himself sold, being entitled to a lien for an advance which he had made, and where he purported to transfer the right of property in the goods. The existence of the defendant's lien in *Cochrane v. Rymill* makes no difference except as a fact negating the suggestion that he was a mere agent or conduit-pipe in that particular case (f), and the

Delivering
without
selling.

(a) See the remarks of Collins, J., upon these opposing views, in *Consolidated Co. v. Curtis & Son*, (1892) 1 Q. B. p. 501.

(b) *Consolidated Co. v. Curtis & Son*, (1892) 1 Q. B. 495; *Cochrane v. Rymill*, (1879) 40 L. T. N. S. 744; *Barker v. Furlong*, (1891) 2 Ch. 172.

(c) See the case put by Bramwell, L.J., *Cochrane v. Rymill*, (1879) 40 L. T. N. S. p. 746.

(d) (1881) 44 L. T. N. S. 307, 767.

(e) (1879) 40 L. T. N. S. 744.

(f) Per Collins, J., *Consolidated Co. v. Curtis & Son*, (1892) 1 Q. B. p. 502.

real distinction, if the cases be not inconsistent, must be that in *Cochrane v. Rymill* the defendant in fact sold, in *National Mercantile Bank v. Rymill* he only delivered the goods, but with knowledge of the sale and with the intention of enabling it to be carried out. Whether the latter case is consistent with *Stephens v. Elwall* (a) may be doubted.

Breach of
warranty by
auctioneer.

It is a breach of warranty, sounding either in damages as against the auctioneer or, justifying a rescission of contract as against a principal, for an auctioneer to make a specific statement with respect to the chattel that he is selling which, to his knowledge, is not a fact. Thus if an auctioneer sell a chattel as being the property of a particular person, of known repute, and that person has prior to the sale, to the knowledge of the auctioneer, parted with his interest in the chattel to a third party, on whose behalf the sale is actually made, the alteration in ownership has been held to constitute a sufficient ground for rescinding the contract (b).

Again, a secret limitation of authority at a sale "without reserve," such as reserve price, if known to the auctioneer but not known to the buyer, will entitle the latter to damages for non-delivery (c) as soon as the hammer has fallen and he has been declared purchaser (d), provided a note or memorandum of the sale has been made.

In the case of *Spackman v. Foster* (e) certain title deeds of the plaintiff had been pledged with the defendant by a third party wrongfully. It was held that the defendant had not been guilty of a conversion by taking them in pledge. "The defendant when he received these deeds had no knowledge that the person who pledged them had no title to them. He kept them as depositary or bailee bound to return them on payment of the money he had advanced. He held them against the person who had deposited

(a) As to which, see above, p. 250.

(b) *Whurr v. Derenish*, (1904) 20 T. L. R. 385.

(c) *Rainbow v. Hawkins*, (1904) 2 K. B. 322.

(d) *Fenwick v. Macdonald, Fraser & Co.*, (1904) 6 F. 850, Ct. of Sess.

(e) (1883) 11 Q. B. D. 99; approved by Kay, L.J., *Miller v. Dell*, (1891) 1 Q. B. p. 473. The principle of *Spack-*

man v. Foster seems to be that a person who innocently takes a chattel by assignment from one who is not the true owner, is not guilty of a conversion by the mere taking, but only becomes so if and when, either by parting with it or by damaging it, he has put it out of his power to deliver it on demand to the true owner in the same condition as that in which he received it.

them, but not against the real owner" (a). A pledgee, however, takes the pledge with a warranty of title, intending to obtain a special property which gives him a power of sale (b). He is acting just as inconsistently with the right of the true owner as if he actually purchased (c). This decision is directly in conflict with Lord Ellenborough's judgment in *M'Combie v. Davies* (d), and the earlier case seems more in accordance with the general course of the authorities, and with the observations in *Hollins v. Fowler*. In cases of an unauthorised deposit of securities, belonging to a third party, by a solicitor, broker or other agent, with bankers to secure an advance, the claim of the true owner is subordinated to that of the pledgee, who receives in good faith and without notice, the equitable principle underlying such transaction apparently being that, where one of two innocent persons has to suffer a loss, it should fall on that one of the two who could most easily have prevented the happening or recurrence of the mischief (e).

The action of detinue was based upon a wrongful detention of the plaintiff's chattel by the defendant, evidenced by a refusal to deliver it up on demand, and the redress claimed was not damages for the wrong but the return of the chattel or its value. The old form of declaration was either in *detinue sur trover*, alleging a finding by the defendant, or in *detinue sur bailment*, alleging a bailment to him. These allegations, which were immaterial and not traversable, were abolished by the Common Law Procedure Act of 1852 (f). In truth, however, though the two kinds of detinue were thus confused, the distinction between detinue where there had been a bailment and detinue where there had not was a fundamental one. The former was essentially an action in contract, the latter especially in tort (g).

Detinue.

Sur trover and sur bailment.

(a) *Per* Grove, J., at p. 100.

(b) See Story on Bailments, ss. 308, 354,

(c) In *Tear v. Freebody*, (1858) 4 C. B. N. S. 228, it was held that a taking with a view to acquiring a lien might be a conversion. See above, p. 235.

(d) (1805) 6 East, 538.

(e) *Mutton v. Peat*, (1900) 2 Ch. 79, C. A. See also *Oliver v. Bank of England*, (1902) 1 Ch. 610, C. A.

(f) Chitty on Pleading, 7th ed. vol. 1, p. 135; vol. 2, p. 428; *Gledstane v. Hewitt*, (1831) 1 C. & J. 565; 15 & 16 Vict. c. 76, s. 49.

(g) See note, *Walker v. Needham*, (1841) 3 M. & G. p. 561. As to whether detinue was contract or tort, see *Broadbent v. Ledward*, (1839) 11 A. & E. 209; *Gledstane v. Hewitt*, *supra*; *Bryant v. Herbert*, (1878) 3 C. P. D. 189 & 389.

commence an action of replevin within a week, to prosecute it with effect (a) without delay, and to make return of the goods if return thereof shall be awarded. If he succeed in his action he may recover in respect of any special damage sustained and also the value of the goods if, in fact, they have not been redelivered (b) to him under the process of the county court. He may also recover the expenses of the replevin bond and any special damage which he has sustained by the wrongful taking (c). In *Smith v. Enright* (d) it was held that such special damage may include annoyance and injury to credit and reputation in trade (e). If the defendant succeeds he is, at common law, entitled only to a judgment for the return of the goods (f). Under certain statutes now repealed the defendant was entitled to recover any special damage which he had suffered. It appears that in spite of the repeal such damage is still recoverable (g). The defendant has also the remedy on the replevin bond for a breach of any of its conditions.

Replevin
only in case
of trespass.

Replevin can only be brought when there has been a taking by trespass, whether under colour of some legal process or otherwise (h). In *Mennie v. Blake* (i) the plaintiff had lent a cart and horse to one Facey, who handed them over to the defendant in satisfaction of a debt. The plaintiff proceeded by replevin, but it was held that the action was not maintainable, because the possession of the defendant was peaceable (k).

If, however, a distrainer before impounding refuses a due tender, the owner may still replevy, because, it is said, the

(a) *I.e.*, to a not unsuccessful termination (*Tummons v. Ogle*, (1856) 6 E. & B. 571).

(b) An action, it would seem, lies if the person who has taken the goods disposes of them with notice of the replevin proceedings (*Mounsey v. Dawson*, (1837) 6 A. & E. 752).

(c) *Gibbs v. Cruikshank*, (1873) L. R. 8 C. P. 454.

(d) (1893) 69 L. T. N. S. 724.

(e) But that case appears to be opposed to *Dixon v. Calcraft*, (1892) 1 Q. B. pp. 464, 466, as to which see above, p. 137.

(f) *Gotobed v. Wool*, (1817) 6 M. & S.

128.

(g) *Smith v. Enright*, (1893) W. N. 173; and see *Mayne on Damages*, 7th ed. p. 453.

(h) *Shannon v. Shannon*, (1804) 1 Sch. & Lef. 324; *Galloway v. Bird*, (1827) 4 Bing. 299.

(i) (1856) 6 E. & B. 842.

(k) The Court seems to have been of opinion that the possession of the defendant was not only peaceable but lawful until the plaintiff should demand the property back. It would seem, however, that the taking was an act of conversion (see above, p. 232) though doubtless no trespass.

subsequent detention is equivalent to a fresh taking. The reason given is of doubtful validity (a). The ordinary use of replevin is in cases of distress for rent or distress *damage feasant*. It has, however, been frequently employed by parties complaining of a seizure of their goods under process of an inferior Court issued without jurisdiction (b); and in this way questions of rating liability have, on more than one occasion, been brought to the test (c). When it lies.

But there can be no replevin against an execution of a superior Court (d), nor against a revenue seizure or distress for any Crown due (e). When not.

In *Mellor v. Leather* (f) the plaintiff's property had been seized by a constable on information that the plaintiff had stolen it. It was held that, assuming the seizure to be unlawful, an action of replevin was maintainable, although an unusual form of remedy in such a case.

An action can be brought for the taking or conversion of any corporeal personal property (g), including papers and title deeds (h). It is sometimes said that current coin of the realm is an exception to this rule, and money, unless "in a bag," cannot be sued for in an action of tort. This, however, is incorrect (i). Of course if a man simply receives a sum to be repaid on request the property in it passes, and his only liability is for the debt, but if the undertaking is that he should return or hand over the specific coins entrusted to him and he converts them to his own use an action of trover will lie (k). It is an *à fortiori* case if there has been an unauthorised taking out of the actual possession of the owner; but if the coins are paid What kind of property can be sued for.
Money.

(a) *Evans v. Elliot*, (1836) 5 A. & E. 142. See below, p. 288, note (u).

(b) *Rex v. Burchett*, (1722) 1 Str. 567; *George v. Chambers*, (1843) 11 M. & W. 149; *Allen v. Sharp*, (1848) 2 Ex. 352.

(c) *Governors of Bristol Poor v. Wait*, (1834) 1 A. & E. 264; *Mersey Docks & Harbour Board v. Cameron*, (1864-5) 11 H. L. C. 443; *Marshall v. Pitman*, (1833) 9 Bing. 595; *London & North Western R. Co. v. Buckmaster*, (1874) L. R. 10 Q. B. 70.

(d) *Per Parke, B., George v. Cham-*

bers, (1843) 11 M. & W. p. 160.

(e) *Rex v. Oliver*, (1717) Bunbury, 14; *per Eyre, C.B., Cawthorne v. Campbell*, (1790) 1 Anstruther, p. 212.

(f) (1853) 1 E. & B. 619.

(g) *Allen v. Sharp*, (1848) 2 Ex. 352.

(h) *Anon.*, (1828) 1 Moll. 390, but see Bacon's Abr. tit. Replevin F.

(i) *Hall v. Dean*, (1600) Cro. Eliz. 841; *Draycot v. Piot*, (1601) *ibid.* 818; *Kinaston v. Moor*, (1627) Cro. Car. 89.

(k) *Orton v. Butler*, (1822) 5 B. & Ald. 652.

over to an innocent third party, then the property is transferred and the money cannot be followed in his hands (*a*). Whenever the facts are such that a charge of larceny, whether by a taking or as bailee, could be supported, it would seem to follow that there is also a conversion (*b*).

Negotiable instruments.

Negotiable instruments and other securities, such as guarantees and bonds, considered as corporeal property, are simply pieces of paper. Their sole value is as *choses in action*. If, however, they are unlawfully converted and detained, the person entitled may recover full damages to the extent of his loss (*c*).

Title deeds.

Although title deeds are not, properly speaking, chattels, it has always been held that they can be sued for in trover or detinue (*d*). It is said, however, that they cannot be replevied (*e*). If the plaintiff sues in trover, his damage is *prima facie* the whole value of the estate to which they appertain (*f*).

Realty when severed.

If a portion of realty is severed and taken away the owner, instead of suing in respect of the injury to the realty, may elect to treat the severed portion as his chattel and sue for its conversion. In this way a remedy may be obtained for coal wrongfully worked, timber wrongfully cut, fixtures wrongfully removed (*g*). In certain American States it has been held, where the taking was wilful and tortious, that if subsequently to the conversion the nature of the chattel was altered (as, for example, if logs were sawn into boards, or growing wheat was harvested and threshed), the plaintiff was entitled to recover the value of the chattel in its new forms (*h*), but this principle finds no place in modern English law. But even tenant's fixtures, while they remain unsevered, are part of the realty, and therefore trover

American rule as to measure of damages in certain States.

(*a*) *Foster v. Green*, (1862) 7 H. & N. 870.
881.

(*b*) See *Reg. v. Hussall*, (1861) 30 L. J. M. C. 175; *Reg. v. Aden*, (1873) 12 Cox 512; *Reg. v. De Banks*, (1884) 13 Q. B. D. 29. This last case seems open to some question.

(*c*) *Alsager v. Close*, (1842) 10 M. & W. 576; *Watson v. McLean*, (1858) E. B. & E. 75; *McLeod v. McGhee*, (1841) 2 M. & G. 326; *Kleinwort, Sons & Co. v. Comptoir National d'Escompte, Paris*, (1894) 2 Q. B. 157. But see *Embericos v. Anglo-Austrian Bank*, (1904) 2 K. B.

(*d*) *Plant v. Cotterill*, (1860) 5 H. & N. 430.

(*e*) Vin. Ab. Replevin A. 9; Bacon's Abr. tit. Replevin F., but see *Anon.* (1828) 1 Moll. 390.

(*f*) *Per Alderson, B., Loosemore v. Radford*, (1842) 9 M. & W. p. 659.

(*g*) *Wood v. Morewood*, (1841) 3 Q. B. 440, note; *Berry v. Heard*, (1637) Cro. Car. 242; *Farrant v. Thompson*, (1822) 5 B. & Ald. 826.

(*h*) Sedgwick on Damages, 8th ed., vol. 2, s. 502.

cannot be brought in respect of them (a). There may, however, be a special action on the case if there be an interference with the exercise of the right of removal (b).

The general rule is that the right to bring an action for an injury committed in respect of a chattel belongs to him who either has the actual possession or the right of immediate possession at the time when the cause of action arises (c).

Plaintiff
should have
right of
possession.

To this rule there is an apparent but not a real exception in the case of title by relation. If the goods of a deceased person are unlawfully taken by a stranger between the time of his death and the grant of probate or letters of administration, even if the executor or the administrator had no right of possession at the time of the conversion, yet after his title is perfected it relates back to the death of the testator or intestate, and he is treated as if he had had the right of possession throughout (d). On the same principle a trustee in bankruptcy may sue in respect of a conversion committed between the date of the act of bankruptcy and his appointment (e).

Title by
relation.

It was indeed frequently said that in trover a plaintiff sues in respect of his property, in trespass, in respect of his possession, and this doctrine finds expression in the old forms of pleading. On this ground it has been broadly laid down that a plaintiff who makes title by relation can sue only in trover (f). This, however, is incorrect. A title which relates back, as has already been seen, avails to support an action of trespass, if trespass has been in fact committed (g). On the other hand, an action in trover does not decide any question of ownership. An owner cannot sue for a conversion unless he has also a right of possession; a mere possessor can, although he has no title beyond his possession. The use of the word "property," therefore, in respect of actions of trover, is misleading, and requires explanation.

Possession
and property

(a) *Mackintosh v. Trotter*, (1838) 3 M. & W. 184.

(b) See *London & Westminster Loan & Discount Co. v. Drake*, (1859) 6 C. B. N. S. 798.

(c) *Wilbraham v. Snow*, (1669) 2 Wm. Saund. 47 a; *Brierly v. Kendall*, (1852) 17 Q. B. 937. As to reversionary interests, see below, p. 264.

(d) Holt, J., in *Jenkins v. Plombe*, (1704) 6 Mod. Repts. s. 181, case 265.

(e) *Garland v. Carlisle*, (1837) 4 Cl. & F. 693.

(f) Per Patteson, J., *Balme v. Hutton*, (1833) 9 Bing. p. 477.

(g) See above, p. 232; *Tharpe v. Stallwood*, (1843) 5 M. & G. 760.

The ownership of chattels is, as a general rule, absolute except in the case of title deeds, the property of which follows the nature of the land to which they belong. There may, however, be a double ownership. An undischarged bankrupt may acquire the property in goods, subject to the right of his trustee to intervene and claim them (a). The Crown and its grantees are the owners of wreck cast on shore if the shipowner does not assert his right within a given time (b); and so the lord of a manor is the owner of estrays provided they are not reclaimed (c). In all these cases there is a true right of property independent of any act of possession, and defeasible only by the intervention of him who has the superior right.

Finder of
chattel.

The person who finds a chattel, or otherwise comes into its possession in an unauthorised manner, has in one sense a right of ownership, because he holds on his own account, and not by delegation from any one else with a superior title. He, however, may not only be evicted by the true owner, but if he loses possession he may subsequently be defeated in asserting any claim against a subsequent finder by reason of the infirmity of his title (d). Moreover, where chattels are discovered in private houses or upon private ground (in cases where the law of treasure trove does not apply) the fact that the finder was a trespasser, or at most a licensee, will subordinate his claim to that of the owner of the house or ground (e). But this rule does not apply in quasi-public places such as shops or railway stations (f). In these cases the right is called a special property, to distinguish it from the general or absolute property of the person who has a right against all the world.

Special and
general
property.

The term "special property" is, however, also employed to designate rights over chattels of a purely subordinate and

(a) *Fowler v. Down*, (1797) 1 B. & P. 44; *Morgan v. Knight*, (1864) 15 C. B. N. S. 669; *Cohen v. Mitchell*, (1890) 25 Q. B. D. 262; *In re Clarke, Ex parte Beardmore*, (1894) 2 Q. B. 393. As to limitations on ownership of chattels by a bankrupt, see *Burnand, In re, Baker, Sutton & Co., Ex parte*, (1904) 2 K. B. 68, C. A.

(b) *Dunwich v. Sterry*, (1831) 1 B. &

Ad. 831.

(c) *Per Ashhurst, J., Smith v. Miles*, (1786) 1 T. R. p. 480.

(d) See below, p. 270.

(e) *South Staffordshire Waterworks Co. v. Sharman*, (1896) 2 Q. B. 44; 65 L. J. Q. B. 460, at p. 462.

(f) *Bridges v. Hawkenworth*, (1851) 21 L. J. Q. B. 75.

derivative character. A pledgee or unpaid vendor is not the owner of goods, but he has the exclusive right of possession for the time being, and he has also a power of sale which enables him to give third parties a title which he does not possess himself. A mortgagor before default, or a hirer of goods, or a man holding them under a lien, has an exclusive right of possession, but nothing more. If goods are lent to a man or deposited with him he has a mere possession ; his bailor has still a right of possession, and may take the goods out of his hands at any time. In all these cases the temporary right which the owner has given is spoken of as a special property, and in this use of the term the action of trover is said to be founded on property. The result is, that in trover, as in trespass, the true question is the right of possession.

Pledge and vendor's lien.

Exclusive right of possession.

If the undisputed owner is in the actual possession of the chattel in question, it is of course clear that he is the only person who can make any claim for a wrong done in respect of it. Questions of difficulty arise first of all where there is no doubt about the ownership, but the owner has made over a possessory right to some one else ; secondly, where the ownership itself is in dispute.

Trover depends on possession.

If the owner has given to some one else a possessory right, the person who has that right may bring the action, whether he has the actual possession or not. Generally such right is given accompanied by an actual transfer of custody, but this is not necessary ; and a factor or agent to whom goods are consigned has a special property, in virtue of which he may sue even before they have come into his hands (a). The owner himself may or may not have a concurrent right of action, according to circumstances.

Right of possession before actual possession.

1. Certain bailments give an exclusive right of possession to the bailee. If goods are let or pledged, the hirer or pledgee, as the case may be, has the exclusive custody and consequently the right of action (b) until the contract is determined. In such cases, therefore, the bailor has no right of possession, and cannot sue (c). So if goods are held subject to a lien, the owner's right

Exclusive right of possession apart from ownership.

(a) *Merison v. Gray*, (1824) 2 Bing. (1824) 2 Bing. 173.

260. (c) *Gordon v. Harper*, (1796) 7 T. R.

(b) Best, C.J., in *Burton v. Hughes*, 9.

Special
property.

Whittaker (a), the plaintiff, a tenant, had assigned to a trustee for the benefit of his wife goods upon which his landlord distrained. Though the plaintiff was neither legal nor equitable owner of the goods, it was held that his mere enjoyment of the use of them with the consent of his wife and her trustee, gave him a sufficient interest in them to entitle him to maintain an action for an excessive distress.

Plaintiff
never in
possession.

2. If the plaintiff has never been in possession he must recover on the strength of his title. He cannot, therefore, succeed where it is proved that there is a third party who has a better title, for the sole thing upon which he relies is thereby destroyed. In *Gadsden v. Barrow (b)* the plaintiff in an interpleader issue claimed certain goods as against an execution creditor. They had been assigned to him by the execution debtor under a bill of sale, but remained in the possession of the assignor. The creditor successfully set up a prior bill of sale by which the same goods had been assigned to a third party who made no claim. The plaintiff had clearly no title, because his grantor had previously parted with all his right (c). It is true that the execution creditor had no right either, but there being an equal absence of right on either side the party failed on whom the burden of proof lay.

With this case may be contrasted *Morgan v. Knight (d)*. The plaintiffs were the assignees in the second bankruptcy of one Knight, an uncertificated bankrupt. Knight had been allowed by the assignees in his first bankruptcy to trade on his own account.

the immediate custody or control of a chattel. He is in constructive possession when he has lost the possession and no one else has acquired it. He is also in constructive possession when his servant has the charge of it. The servant has the actual possession, but not a possession sufficient to enable him to sue. Finally, in the case under consideration the possession of a bailee is said to be the possession of the bailor.

(a) (1871) L. R. 7 Q. B. 120.

(b) (1854) 9 Ex. 514. *Edwards v. English*, (1857) 7 E. & B. 564, seems difficult to reconcile with this case, but here the difficulty arose not in respect of the rule of law, but in respect of the

meaning to be attached to the issue; cp. *Chase v. Goble*, (1841) 2 M. & G. 930.

(c) If the grantor had an equity of redemption under the first bill of sale, he might convey an equitable title to the grantee of the second bill of sale, which the Courts would recognise in an interpleader. See *Duncan v. Cashen*, (1875) L. R. 10 C. P. 554; *Engelbach v. Nixon*, (1875) L. R. 10 C. P. 645. In *Usher v. Martin*, (1889) 24 Q. B. D. 272, a claimant possessed of the equity of redemption in goods was held to be entitled to them as against the execution creditor.

(d) (1864) 15 C. B. N. S. 669.

He acquired certain property and transferred it to the defendant. In an action brought by the plaintiff, the defendant endeavoured to protect himself by pleading that the property was a property defeasible indeed at the time of the transfer, but available against everybody else.

3. If one who has bare possession of such possession and then seeks to recover the property, it is apprehended that the title will be set up against him. For since he has no title, he must rely on his title, and the title *in* *facie* from his possession is rebutted. If it is proved (a), such proof amounts to a paramount (b).

4. If a plaintiff in trespass or trover has title only, it is always permissible for the defendant to plead that he ceased before the date of the alleged trespass. In *Loveday* (c), the plaintiff had let certain goods afterwards became bankrupt, the furniture and disposition. The assignees were appointed, and an execution being subsequently put in, the goods were sold, they gave notice of their title over to them the proceeds. The plaintiff claimed the goods back to the act of bankruptcy, but it was held that the title of the assignees was not divested of his title at the time of the seizure, and he could not recover.

5. A bailee is not as a general rule entitled to set up *jus tertii*, whether the title is acquired by a delivery or by an acknowledgment. If goods in the bailee's possession (d), he cannot dispute his bailor's title. The only case

is (a), and the case (b). And even by reason of any immediate possession the plaintiff is entitled to recover therein, subject to the title of the defendant. Thus, if a plaintiff in default realised the title to the possession of the goods, although upon the title over to the

goods to a retail dealer until they fraudulently pledged at the wholesale price, and recover the title the possession of the goods is not estoppel (d).

recovered and carried the trespass to the chattel and bring an action of trover. The right to the person who of the severance, and the title. Thus, if

Goods "on sale or return."

Who may sue for severed realty.

Trees.

property of him is not an impeachment of the title which are not

by a storm, the title to build it up

Ehrmann, (1904)

(1637) Cro. Car. 85) 1 T. R. 55.

Ch, (1826) 5 B. &

(a) This is assumed in the judgment of Erle, C.J., in *Bourne v. Fosbrooke*, (1865) 18 C. B. N. S. 515, for otherwise it would not have been necessary to argue that there was a continuance of possession.

(b) *See* *Richards*, 11 Q. B. 181; *Richards*, 11 Q. B. 181; *Richards*, 11 Q. B. 181.

Fixtures.

again (a). But if he unlawfully pulls it down, it would seem that the right of possession at once passes to the landlord (b). If a tenant unlawfully severs fixtures the landlord may recover either against him or any person who subsequently detains them, because the tenant's own wrongful act has determined his right to their enjoyment (c). But if the severance is by the act of God or the act of a stranger there seems no reason in such a case why the tenant should lose all right of property (d).

Damages for deprivation of goods.

The damages to which a plaintiff, who has been deprived of his goods, is entitled, are *primâ facie* the value of the goods, together with any special loss which he may have incurred in consequence of the wrong, although in one case it was held that, under such circumstances, the measure of damages was no more than the "breaking up" or auction price of the fixtures (e).

Trespass without deprivation.

And where there has been a mere trespass unaccompanied by any deprivation of possession he cannot, of course, recover more in respect of the goods themselves than the loss which he has suffered by their diminution in value. But, as has already been seen in case of trespass, the tribunal may give general damages, having regard to all the circumstances of the case (f).

Value at time of wrongful act to be taken.

Where the value has fluctuated it must be taken as it stood at the time of the wrongful act (g).

(a) *Herlakenden's case*, (1588) 4 Rep. p. 63 a.

(b) *Per* Holroyd, J., *Farrant v. Thompson*, (1822) 5 B. & Ald. p. 829.

(c) *Farrant v. Thompson*, (1822) 5 B. & Ald. 827.

(d) Some of the judges in *Farrant v. Thompson* (*supra*) express themselves to the effect that fixtures, like trees, in all cases of severance at once vest in the owner of the fee. This, however, is contrary to the resolution in *Herlakenden's case*.

(e) *Barff v. Probyn*, (1895) 73 L. T. 119.

(f) See above, pp. 135-136.

(g) In *Greening v. Wilkinson*, (1825) 1 C. & P. 625, where the cotton which formed the subject-matter of an action of trover rose in value between the date of the conversion and that of the trial, Abbott, C.J., held that the jury in esti-

imating the damages were not limited to the mere value of the property at the time of the conversion, but were at liberty to find as damages the value at a subsequent time at their discretion. There does not appear to be any reported case in which *Greening v. Wilkinson* has been either questioned or followed, but it has been frequently laid down, and the rule now appears to be established, that the proper measure of damages is the market value of the goods at the time of the conversion. See *Falk v. Fletcher*, (1865) 18 C. B. N. S. 403; *Johnson v. Lancashire & Yorkshire R. Co.*, (1878) 3 C. P. D. 499; *Henderson & Co. v. Williams*, (1895) 1 Q. B. 521; *Rhodes v. Moules*, (1895) 1 Ch. p. 254; though in none of those cases was the question of fluctuation in value raised. The statute, 3 & 4 Will. IV. c. 42 proceeds upon the

In one case where goods had been wrongfully sold in the course of a voyage, the owner obtained as damages the cost price of the goods and the freight (a). In another, under similar circumstances, he obtained the amount he would have realised at the port of destination, less freight (b). And in another action, for breach of contract, it was decided that, in order to recover "consequential" damages, it is not always necessary to prove the exact amount actually lost, if it can be shown that a proper delivery of the chattels on a former occasion resulted in a substantial profit (c).

How
estimated.

In yet another case in which the defendant had undertaken to supply a pure article of a well-known description, but in breach of agreement had supplied the article in an adulterated and poisonous condition, it was held that the measure of damages to which the plaintiffs were entitled was the price paid by them for the impure article, together with the value of the goods spoiled by admixture with the adulterated substitute (d).

Sometimes the price which the defendant himself realised has been given, and where the assignees of a bankrupt sued a sheriff for a sale under a wrongful execution the defendant was allowed the expenses of the sale on the ground that the assignees themselves would have been compelled to incur similar expenses in order to realise the estate (e). But a like allowance ought not to be made where no sale was contemplated by the plaintiff (f). In *France v. Gaudet* (g) the plaintiff had made a specially advantageous bargain for the sale of certain wine, which the defendant subsequently converted. The plaintiff being unable to complete his contract, owing to the fact that no wine of the like quality was procurable in the market, was allowed as damages

assumption that such is the rule, when it empowers the jury (s. 29) to give "damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass *de bonis asportatis*."

(a) *Exobank v. Nutting*, (1849) 7 C. B. 797.

(b) *Burmah Trading Corporation v. Mirza Mohamed Ally Sherazee*, (1878) L. R. 5 Ind. App. 130.

(c) *Simpson v. London & North*

Western R. Co., (1876) 1 Q. B. D. 274.

(d) *Bostock & Co. v. Nicholson & Sons*, (1904) 1 K. B. 725. And as to measure of damages, see *The Greta Holme*, (1896) P. 192, C. A.

(e) *Clarke v. Nicholson*, (1835) 1 C. M. & R. 724; *Whitmore v. Black*, (1844) 13 M. & W. 507.

(f) *Glasspoole v. Young*, (1829) 9 B. & C. 696.

(g) (1871) L. R. 6 Q. B. 199.

the whole sum which he would have received from the purchaser. In all these cases, however, there has been no dispute about the principle. They simply afford illustrations of the various kinds of evidence which a jury may be permitted to take into consideration.

Work and labour subsequently expended on chattel.

The damages being fixed at the date of the wrongful act, a plaintiff cannot take advantage of any increased value given to the chattel by work and labour subsequently expended upon it. In *Reid v. Fairbanks* (a) the defendant had converted a half-built ship belonging to the plaintiffs and afterwards completed her. It was held that the measure of damage was the value of the vessel in its unfinished condition. On the same principle, if a portion of realty is severed and the party entitled elects to sue for it as a chattel, he can at most recover only its value when first severed. He cannot, for instance, when coal has been unlawfully taken, recover its value at the pit's mouth, but only at the bottom of the mine (b). He must deduct the expense of raising though not of winning (c).

Severed realty.

Fixtures.

Where fixtures wrongfully severed are sued for as chattels the measure of damage is their value as such, and not the damage to the realty (d).

Securities for money.

The measure of damages for depriving the plaintiff of a security for money is its value at the time of the wrongful act. In the absence of anything to the contrary, it may be taken that the security is a good one and worth the whole amount which the plaintiff might have been entitled to receive on it from the parties liable, and obviously a defendant cannot be permitted to avail himself of any diminution of value which it may have suffered through his own wrongful conduct (e). If, however, owing to the insolvency of the parties, or for any other reason, the security is depreciated, it would of course be unjust for the plaintiff to recover full nominal value (f). Where there is a market a jury

(a) (1853) 13 C. B. 692.

(b) As to law in certain American States, see *ante*, p. 259.

(c) See below, p. 358.

(d) *Clarke v. Holford*, (1848) 2 C. & K. 540; *Barff v. Probyn*, (1895) 73 L. T. 119.

(e) *Delegal v. Naylor*, (1831) 7 Bing. 460; *M'Leod v. M'Ghee*, (1841) 2 M. & G. 326; *Alsager v. Close*, (1842) 10 M. & W. 576.

(f) See Sedgwick on Damages, 7th ed. vol. 2, pp. 465-6; *Delegal v. Naylor*, *supra*.

would probably give damages according to the current quotation at the time of the cause of action. It is no evidence of the value of a security in fact worthless, that money, either by mistake or otherwise, has in fact been paid upon it (*a*). It is submitted, however, that the general proposition stated above must be taken with this reservation; that where the defendant is in a fiduciary position towards the plaintiff, as, for instance, a stockbroker in regard to his client, the measure of damages for a tort, when there is no laches on the part of the plaintiff, would be the highest price of the security between the date of the wrongful act and the time of bringing the action (*b*).

In respect of the loss of title deeds a plaintiff is entitled *prima facie* to recover the value of the estate which they represent (*c*), the damages being, of course, reducible to a nominal sum on their return. What is the measure of damage where it is out of the power of the defendant to make return, does not appear. It is said that if he has destroyed the deeds he is still liable for the full value of the property (*d*). But no right of action prior to redemption accrues to a plaintiff in case of the loss of, or damage to, title deeds deposited as equitable security to cover an advance (*e*). Nor is there apparently, apart from special contract, any covenant on the part of a mortgagee to take care of title deeds during the continuance of the security (*f*), although the statutory right of a mortgagor to inspect his title deeds (*g*) may, by implication, be construed as raising a duty on the part of the mortgagee to exercise reasonable care in their custody; and the wilful or negligent destruction of deeds by a defendant entitles the plaintiff to recover damages commensurate with his loss (*h*).

Where there is a doubt about the value of a chattel which has passed wrongfully into the possession of a defendant, he must either produce it or account for its non-production, otherwise it

Presumption
of value
against
wrong-doer.

(*a*) *Mathew v. Sherwell*, (1810) 2 Taunt. 439; *Wills v. Wells*, (1818) 8 Taunt. 264.

(*b*) *Michael v. Hart*, (1901) 2 K. B. 867.

(*c*) *Per Alderson, B., Loosemore v. Radford*, (1842) 9 M. & W. p. 659.

(*d*) *Per Cur. Williams v. Archer*,

(1847) 5 C. B. pp. 327-9.

(*e*) *Gilligan v. National Bank*, (1901) 2 Ir. R. 518.

(*f*) S. C.

(*g*) 44 & 45 Vict. c. 41, s. 16 (sub-s. 1.)

(*h*) *Hornby v. Matcham*. (1849) 16 Sim. 325.

*The
Winkfield.*

its full value, or such proportion of its full value as he may himself have derived from the tort-feasor. Nor does the fact that bailor as well as a bailee has a right of action against a wrongdoer logically detract from that innate right to demand compensation for a tort which follows as a necessary corollary to the right to legal possession.

The fact that damages, amounting to satisfaction in full, have been recovered by the bailor or by the bailee, does not do away with that right of action which is innate to the one by reason of his ultimate title to the goods, and to the other by reason of his legal possession; it merely acts as an estoppel to further action against the defendant in respect of that particular tort for which the damages have been recovered, upon the well-known principle of law *Nemo debet bis vexari, pro una et eadem causa*, although where "both the bailee and the bailor have suffered damage by the wrongful act of a third party each may bring a separate action for the loss suffered by himself" (a).

Up to the date of the decision in *The Winkfield* it must be conceded that the rulings in the various cases which have arisen on this particular point are quite irreconcilable.

For, though the consensus of opinion of both the judges and the text-books is in favour of the ultimate decision arrived at by the Court of Appeal, in the comparatively recent case of *Claridge v. South Staffordshire Tramway Co.* (already referred to), an exactly opposite decision was given by the Court, and leave to appeal refused; it being held in this case that the plaintiff, who was bailee of a horse which was injured while in his possession by the negligence of the defendants, could only recover nominal damages, he being under no liability to his bailor for the injury done to the chattel whilst in his custody.

O. W. Holmes, jun., in his very learned disquisition on "The Common Law" (b), attributes the principle underlying the right of the bailee to sue a tort-feasor for the conversion of, or for damage to, a chattel in his possession, to an early Germanic

(a) *Claridge v. South Staffordshire Tramway Co.*, (1892) 1 Q. B., Hawkins, J., at p. 424. As to the measure of damages recoverable, see *The Great Eastern Ry. v. Great Eastern Ry. Co.*, (1896) P. 192, C. A.

(b) Lecture V., "Bailment."

origin, considerably antedating the bailee's claim to recover to that subsequently allowed to the bailor.

Whether this statement can be substantiated or no, there can be little doubt that from very early times legal possession of a chattel has been held to carry with it, as an inherent right, all legal remedies pertaining to complete dominion. Consequently the view arrived at by the Court of Appeal in the case of *The Winkfield* possesses the sanctions of high antiquity as well as those of modern expediency.

When the action is between persons both having an interest in the chattel, as, for example, between bailor and bailee, then the measure of damages is the injury actually sustained, and limited, therefore, to the amount of the plaintiff's interest.

Between parties both having an interest.

Thus, in *Brierley v. Kendall* (a), the plaintiff had assigned to the defendants certain chattels under a bill of sale which gave him exclusive right of possession until default. The defendant seized before default, and it was held that the plaintiff could recover only what his right of possession against the defendant was worth. *Johnson v. Steer* (b) was a converse case, being an action by the owner against the pledgee who was held to have unlawfully parted with the goods pledged. The plaintiff recovered only nominal damages, the property having been pledged for its full value. On the same principle an unpaid vendor who, having sold goods on credit, resold them before the term of credit expired, was held to be liable only to the extent of the difference between the money due under the contract and the value of the goods at the time of the resale (c).

Between mortgagor and mortgagee.

Between pledgor and pledgee.

Between vendee and vendor.

But where a vendor had parted with the goods to the vendee and afterwards being unpaid retook possession, it was held that he was liable to the vendee for the whole value without deduction, the law regarding with disfavour a principle that would admit of a party setting off a debt due in one case against damages in another, though, on the other hand, the vendee was held liable for the price of the goods in a cross action (d).

Where vendor re-takes goods.

(a) (1852) 17 Q. B. 937; 21 L. J. Q. B. 161. *Johnson v. Steer*, it was correctly held that there was a conversion, see above, p. 264, note (c).

(b) (1863) 15 C. B. N. S. 330.

(c) *Chinery v. Viall*, (1860) 5 H. & N. 288. As to whether in this case, and (d) *Gillard v. Brittan*, (1841) 8 M. & W. 575. See too *Johnson v*

Lien.

In the case of an ordinary lien there is no right in the holder of the goods who converts them to deduct, in an action at the suit of the owner, the amount for which he had the lien from the value of the goods. The right is purely personal and is altogether forfeited by the unlawful act (a).

Return of chattel.

When a chattel has been wrongfully taken, detained or otherwise converted, there is a vested cause of action which cannot be defeated merely by the fact that the plaintiff subsequently gets his goods again. But after such redelivery the action is merely for the special damage or deterioration in value, failing which the plaintiff, though he recover nominal damages, is considered in effect as a defeated party and may be made to pay costs (b). The position is the same if the plaintiff, after action brought, thinks proper to take the chattel back (c). The Court has besides power to stay any action on delivery of the chattel and payment of costs, if the circumstances are such as to show that the plaintiff thereby clearly obtains the full redress to which he is entitled (d). If the plaintiff obtains a verdict for the value of the chattel it is common to provide that it shall be reduced to a nominal sum on return being made. But this is simply a matter of arrangement between the parties (e). Even though no such provision is made, yet if, in fact, the plaintiff gets his property back again, the Court will treat this as *pro tanto* a satisfaction and reduce the verdict accordingly (f). And upon a similar principle if part of the chattels in question are given up the action may be stayed in part (g), provided the bulk is severable without diminution of value (h).

Transaction equivalent to return.

In some cases a transaction by which the plaintiff got the

Lancashire & Yorkshire R. Co., (1878) 3 C. P. D. 499.

(a) *Mulliner v. Florence*, (1878) 3 Q. B. D. 484. For two exceptional cases in which on moral grounds the plaintiff was refused the full value of his goods, see *Du Bost v. Beresford*, (1810) 2 Camp. 511; *Cameron v. Wynch*, (1846) 2 C. & K. 264; and see 41 & 42 Vict. c. 38, s. 2.

(b) *Hiort v. London & North Western R. Co.*, (1879) 4 Ex. D. 188.

(c) *Moon v. Raphael*, (1835) 2 Bing. N. C. 310.

(d) *Fisher v. Prince*, (1762) 3 Burr. 1363; *Pickering v. Truste*, (1796) 7 T. R. 53; *Tucker v. Wright*, (1826) 3 Bing. 601.

(e) *M'Leod v. M'Ghee*, (1841) 2 M. & G. p. 328, note (a).

(f) *Plerin v. Henshall*, (1833) 10 Bing. 24.

(g) *Earle v. Holderness*, (1828) 4 Bing. 462.

(h) *Bunney v. Poyntz*, (1832) 4 B. & Ad. 568.

benefit of the property, though it never came back into his hands, has been treated as equivalent to a redelivery. In *Hiort v. London & North Western R. Co.* (a), the defendants held certain corn as warehousemen, deliverable to the plaintiff's order. They improperly delivered it to one G. The plaintiff afterwards sold the same corn and made out a delivery order to the purchaser. It was indorsed by him to G., and by G. handed to the defendants. The Court pointed out that the plaintiff had not been damnified, because he had an action for the price against his purchaser, and they held that what had occurred was the same thing as if the defendants had got back the corn from G. and afterwards delivered it under the plaintiff's order. In *Plevin v. Henshall* (b) the plaintiff had obtained a verdict in trover against the defendant. The goods in question in the action were lying in a house for the rent of which the plaintiff was liable, and the landlord distrained upon them. The verdict was reduced by the amount of the distress, it being held that the parties were in the same situation as if, after verdict, the defendant had gone and paid the plaintiff the sum in question. Otherwise the plaintiff would have had the benefit of the goods twice over, while the defendant, without getting the goods, would have paid their full value. But in *Edmonson v. Nuttall* (c) the defendant unlawfully detained certain chattels of the plaintiff, and afterwards caused them to be taken in execution and sold in satisfaction of a judgment which he had against the plaintiff. It was contended that only nominal damages could be recovered, since the proceeds of the goods had been applied to the benefit of the plaintiff. The Court, however, held that a creditor could not be permitted in this way to take advantage of his own wrongful act, and gave the plaintiff the full value. They pointed out that the defendant suffered no injustice, because he was remitted to his original right on his judgment (d).

It may not unfrequently happen that the owner of a chattel who has wrongfully been deprived of his possession may have a remedy against more than one person. A. may have wrongfully taken it,

Successive conversions.

(a) *Supra*, p. 281.

(b) *Supra*, p. 281.

(c) (1864) 17 C. B. N. S. 280.

(d) The judgments could be set off against each other, and therefore the question was really one of costs.

Effect of
satisfied
judgment.

and B. may afterwards have wrongfully detained it. A. and B. are not joint tort-feasors; there is a perfectly independent right of action against each (a). It has been suggested that in an action against one of these wrong-doers a jury may take into consideration the fact that the plaintiff can also have recourse to the other (b). This suggestion, however, has not been subsequently acted upon, and seems contrary to principle. Nor does a waiver of tort against one wrong-doer, when coupled with a reservation of rights against others, constitute so conclusive a waiver of the original wrong by the plaintiff as to debar him from proceeding against the remaining tort-feasors (c). But if judgment is obtained and satisfied for the full value of a chattel, the property is thereby changed as from the date of the wrongful act, and the plaintiff will consequently lose all right of action against any subsequent wrong-doer (d). He might still, however, it would seem be entitled to nominal damages in respect of anything done previously.

Part satis-
faction.

Recovery of less than the full value does not transmute the property or affect any other right of action (e), but it cannot be doubted that no plaintiff will be allowed to recover twice over, and therefore any damages which he may have actually received in one action will have to be taken into consideration in the other (f)

(a) *Winter v. Bancks*, (1901) 81 L. T. 504.

(b) See *Morris v. Robinson*, (1824) 3 B. & C. pp. 205-6.

(c) *Rice v. Reed*, (1900) 1 Q. B. 54, C. A.

(d) *Brinsmead v. Harrison*, (1871) L. R. 6 C. P. 584.

(e) *Morris v. Robinson*, (1824) 3 B. & C. 196; see note *Holmes v. Wilson*,

(1839) 10 A. & E. p. 511.

(f) "If, indeed, the plaintiffs were to recover the full value of the goods in each action, a Court of Equity would interfere to prevent them having double satisfaction." *Per* Bailey, J., *Morris v. Robinson*, 3 B. & C., at p. 205; and see *The Winkfield*, (1902) P. D., Collins. M.R., pp. 60, 61.

TRESPASS TO CHATTELS AND CONVERSION.

APPARENT CHANGES SINCE THE JUDICATURE ACT.

Much of the decided law and some of the good sense on the subject-matter of this chapter will be found masquerading under some very archaic forms, some of which have been simplified by statute. It is not an unmixed advantage to have ceased in our ordinary practice to think in such terms as "Trover," "Detinue," and "Conversion," and at the same time have to unwrap the law relating to some case of trespass to goods from the unfamiliar garments in which it has been enveloped by many generations of jurists.

It is true that there is a tendency to dispense with some of this erudition. Thus the Chancellor of Ontario (Sir John Boyd) has said:—

"The old learning on the subject of 'conversion' need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained or in case he is wrongfully deprived of them. In all such cases the real question is whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage, and if so, to what extent he has sustained damage" (a).

But this can only be taken to apply to some of the more technical decisions relating to the use of one or other particular form of action, and not to the very numerous old cases expressing decisions on the merits. It must not be supposed that because we do not ask "if trespass or trover will lie" that there is no action for conversion (b), or because we do not head it up "Detinue" that the detention of goods (c) has ceased to be an actionable tort. It will therefore be advisable to follow the example set in the English text and give such of the old decisions as are not merely refinements of obsolete practice.

WHEN ASPORTATION NO TRESPASS (d).

See *Gauhan v. St. Lawrence and Ottawa R. W. Co.* (e).

Ontario.

(a) *Stimson v. Block*, 11 O. R. 96

(b) See, e.g., *Ontario Wind Engine and Pump Co. v. Lockie*, 7 O. L. R. (1904), action for conversion of windmill; also form of statement of claim in action for trespass to goods and conversion in

Bell & Dunn's Practice Forms, 508.

(c) See Holmsted & Langton's Forms and Precedents, Nos. 47, 209, 210.

(d) P. 232, *supra*.

(e) 3 A. R. 392 (1878).

TAKING BY DURESS (a).

Ontario. See *Stewart v. Bryne* (b).

SALE: CONVERSION BY PARTING WITH GOODS (c).

Where defendant received horses to sell at a certain price, and without authority sold for less: held liable in trover for the difference (d).

CARRIER OR WAREHOUSEMAN (e).

See *Winchester v. Busby* (f); *Llado v. Morgan* (g); *Benedict v. Ker* (h).

DEMAND AND REFUSAL (i).

Ontario. The old decisions in Upper Canada show that evidence of demand and refusal was generally sufficient to entitle the plaintiff to recover in trover and detinue (k).

Alberta and Saskatchewan. In an action of detinue where the detention is denied, a demand and refusal must be proved (l).

Ontario. A notice by the owner given at a public sale to a purchaser is equivalent to a demand and refusal (m).

Nova Scotia. A demand of satisfaction for the portion of property destroyed is not sufficient to base an action for conversion of the portion saved (n).

REFUSAL AS EVIDENCE OF CONVERSION (o).

Ontario. The defendant's denial after action of the plaintiff's right to a chattel can be treated as evidence of a conversion before action (p).

WHEN GIVING NO ANSWER AMOUNTS TO REFUSAL.

Ontario. Silence on the part of the defendant when an oral demand was

(a) P. 236

(b) 6 O. S. 146, goods transferred under duress.

(c) P. 237 *supra*.

(d) *Priestman v. Kendrick*, 3 O. S. 66.

(e) P. 238, *supra*.

(f) 16 S. C. R. 336, refusal of agent to deliver after tender of freight.

(g) 23 U. C. C. P. 517, necessity for tender of amount due for storage.

(h) 29 U. C. C. P. 410, warehoused grain sold by defendant.

(i) P. 240, *supra*.

(k) *White v. Batty*, 23 U. C. R. 487. *Walsh v. Brown*, U. C. C. P. 60; but see *Shaffer v. Dumble*, 5 O. R. 716, where the executor of a late husband and his widow's executor both claimed a piano in the late widow's house.

(l) *Gray and Smith v. Guernsey*, 3 Terr. L. R. 439 (1902), *per* Richardson, J.

(m) *Haren v. Lyon*, Tay. 370.

(n) *Barrett v. Suttis*, 17 N. S. R. B. & G.) 262.

(o) P. 241, *supra*.

(p) *Blackley v. Dooley*, 18 O. R. 341.

made upon him when driving at a distance from his house where the chattel was, was held no evidence of a conversion (a). Ontario.

But where the plaintiff's solicitor called on the president of a bank, and, making a demand, was referred to the bank's solicitor, who told him he was not authorised to give any answer, it was held sufficient evidence of a demand and refusal (b).

DELAY IN COMPLYING WITH DEMAND (c).

It is a question for the jury whether the defendant has entertained a *bond fide* doubt as to the plaintiff's right to the goods, and whether a reasonable time had elapsed for clearing it up (d). Ontario.

UNREASONABLE DEMAND.

A hired horse was accidentally hurt and left at a stable by defendant, who notified plaintiff. Plaintiff went to defendant's residence (twenty miles from where the horse was left) and demanded it back sound as received. Held, that defendant's non-delivery of horse on this demand was no evidence of conversion (e). Ontario.

CONVERSION BY AGENT IN CHARGE OF GOODS (f).

See *Menton v. Lee* (g).

Ontario.

CONVERSION BY DESTRUCTION (h).

For the various alternative remedies when wheat has been ground into flour, see *In re Williams and Hope* (i). Ontario.

Stones taken from the land of another and shaped into mill-stones remain the property of the owner of the land (k). Ontario.

PREVENTING REMOVAL OF CHATTEL (l).

Where the plaintiff, quitting possession of his farm, returned for a portion of his goods, which were locked in a barn of which he had the key, found the outer gate locked, demanded that the Ontario.

(a) *McLean v. Graham*, 5 O. S. 741.

(b) *McDonnell v. Bank of Upper Canada*, 7 U. C. R. 252.

(c) Pp. 242, 243, *supra*.

(d) *Gilpin v. Royal Canadian Bank*, 27 U. C. R. 310.

(e) *Wells v. Crew*, 5 O. S. 209.

(f) P. 241, *supra*.

(g) 30 U. C. R. 281 (1870), general verdict with exemplary damages upset.

(h) P. 245, *supra*.

(i) 31 U. C. R. 143.

(k) See *Baker v. Flint*, 3 O. S. 89. Held, that the owner of the land, having directed the carriers to deliver them on his premises, could not be sued in trespass, as the property had not changed by the work done on the stones.

(l) P. 246, *supra*.

Ontario. defendant should open and allow him to get the goods and met with a refusal, the jury found that it was the intention of the defendant to refuse to give up possession of the goods, but it was held that this was not sufficient to constitute a conversion (a).

ACTIONS BETWEEN CO-OWNERS (b).

Ontario. A sale by one joint owner of property does not amount as against his co-owner to a conversion unless the property is destroyed by such sale or the co-owner is deprived of all beneficial interest (c).

New Brunswick. Mixing the common property with other property so that they cannot be distinguished is evidence of conversion (d), but not where the mixing is the wrongful act of the plaintiff (e).

A sale under execution against one co-owner (f) or abandonment to insurers (g) is not enough to constitute conversion.

Nova Scotia. An action for conversion will lie against the purchaser under an execution against one tenant in common if the purchaser re-sells or uses up the property (h).

AGENTS (i).

Ontario. See R. S. O. 1897, c. 150 (Goods entrusted to Agents) (k).

PARTING WITH POSSESSION (l).

Ontario. Detinue is maintainable though defendant had not the goods when action brought; it is sufficient if he once had and improperly parted with them (m).

REPLEVIN (n).

Ontario. See R. S. O. 1897, c. 66; also notes in Holmsted & Langton's

(a) *Smally v. Gallagher*, 26 U. C. C. P. 531.

(b) Pp. 247, 248, *supra*.

(c) *Rourke v. Union Insurance Co.*, 23 S. C. R. 344. Cf. *McNabb v. Howland*, 11 U. C. C. P. 434, sale not in market overt; *Rathwell v. Rathwell*, 26 U. C. R. 179, where sale by co-owner did amount to conversion; *Brady v. Arnold*, 19 U. C. C. P. 42, crops; *Culrer v. Macklem*, 11 U. C. R. 513; *McIntosh v. Port Huron Petrified Brick Co.*, 27 A. R. 262, removal of chattel to foreign parts; *Ecclestone v. Jarris*, 1 U. C. R. 370, no trover against sheriff selling under execution against co-owner.

(d) *McKay v. Crocker*, 5 All. 20, mixing saw-logs.

(e) *Tucker v. Muirhead*, 6 All. 420.

(f) *Prescott v. Moore*, 29 N. B. R. 295.

(g) *Rourke v. Union Insurance Co.*, 32 N. B. R. 40, 191; 23 S. C. R. 344.

(h) *McLellan v. McDougall*, 28 N. S. R. 237.

(i) P. 249, *supra*.

(k) Discussed by Street, J., in *Ontario Wind Engine Pump Co. v. Lockie*, 7 O. L. R. 385 (1904), case of action for conversion.

(l) P. 255, *supra*.

(m) *Mathers v. Lynch*, 28 U. C. R. 354.

(n) P. 257, *supra*.

Judicature Act, 3rd ed. p. 1283, giving history of action of Ontario. replevin under law of Upper Canada.

Where a person claiming books of office had taken possession of them on a mandamus nisi, as if it were a peremptory mandamus, a writ of replevin was refused (a).

MONEY (b).

A person who has been robbed of money may have an action Ontario. for trespass, but he cannot combine with it an action for his expenses and outlay in bringing the robber to justice (c).

TITLE DEEDS (d).

The measure of damages in an action (in trover) for a deed Ontario. passing a fee simple is the value of the land at the time of or subsequent to the conversion (e).

Actions in the nature of trover and detinue will lie for detention of leases as well as other deeds (f).

Where the defendant has shown himself lawfully possessed the onus is on the plaintiff to show a wrongful detention (g).

An action will not lie against a defendant for non-delivery of a deed that has been merely delivered to him in escrow (h).

FIXTURES (i).

Trover is only for severed fixtures, not for fixtures while Ontario. annexed to the freehold (k). But the tenant of a mortgagor can maintain an action (trover) against the mortgagee detaining his shelves, boxes, &c. (not being landlord's fixtures) (l).

TREES: SEVERANCE OF TIMBER (m).

Where defendants wrongfully cut and carried away timber Ontario. from plaintiff's limits the damages were measured by:—

1. The value of the timber after being severed and manufactured and immediately before removal from the limits.

(a) *In re McLay*, 24 U. C. R. 54; *Hammond v. McLay*, 10 L. J. 269. The applicant for replevin should show that he is entitled to the books, the right to their custody depending on the right to the office (registrar).

(b) P. 258, *supra*.

(c) *Pettit v. Mills*, 6 P. R. 297.

(d) P. 259, *supra*.

(e) *Burr v. Munro*, 6 O. S. 57.

(f) *Anderson v. Hamilton*, 4 U. C. R. 372.

(g) *Dowling v. Miller*, 9 U. C. R. 227.

(h) *Reynold v. Waddell*, 12 U. C. R. 9; *Parke v. Stevens*, 12 U. C. C. P. 81.

(i) See pp. 259, 275.

(k) *Oates v. Cameron*, 7 U. C. R. 228.

(l) *Denholm v. Commercial Bank*, 1 U. C. R. 369.

(m) See pp. 259, 272, 275, *supra*.

- Ontario.** 2. Such sum as would represent injury to limits by their being denuded.
3. Such further damage as resulted from acts of defendants, as from their wasteful methods of cutting, &c. (a).
- New Brunswick.** In the case of a licensee to cut timber the property vests in him as soon as cut without any delivery, and he can maintain an action (trover) against the person to whom the person cutting it for him has wrongfully sold it (b). This would not apply to timber cut before licence (c).

REALTY SEVERED: CROPS (d).

- Ontario.** The purchaser at a sheriff's sale of a crop of wheat may bring trespass against a person converting or injuring it, though he may never have received possession of the field (e).
- Manitoba.** For methods of calculating damages where the subject-matter was a wheat crop, see *Monkman v. Follis* (f).
- Nova Scotia.** Ownership of lime excavated: see *McLachlan v. Kennedy* (g).

POSSESSION AND PROPERTY (h).

- Ontario.** The mare (injured by defendant's bull, whence the suit) had been put in plaintiff's field by his father, who said he had given it to the plaintiff. *Semble*, that the right of property was immaterial, as the plaintiff, even if only a bailee, could recover in trespass or case against a wrongdoer (i).
- Where a horse stolen and sold at auction (not in market overt) was seen by the owner, taken possession of, and immediately retaken by the defendant:—Held that, although it was in his possession only for a moment, he could maintain trespass against defendant for the retaking (k).

(a) *Union Bank of Canada v. Rideau Lumber Co.* (1902), 4 O. L. R. 721.

(b) *Segee v. Perley*, 1 Kerr, 439; cf. *Gibson v. McKean*, 3 Pug. 299.

(c) *Carman v. McLeod*, 2 Han. 66; but see *Leighton v. Bohan*, 6 All. 440. For other cases on timber cut on Crown lands before licence, see *Le Bel v. Fredericton Boom Co.*, 4 All. 198; *Coombes v. Hathway*, 3 Kerr, 592; *Tobin v. Hutcheson*, 3 Kerr, 233. For further cases on conversion of timber, see *Hughes v. Sutherland*, 1 Kerr, 574; *Rector of Hampton v. Titus*, 1 All. 278, timber on glebe lands; *Pollok v. Fisher*, 1 All. 515, accepted order for timber:

Jack v. Eagles, 2 All. 95, effect of general assignment; *McMillan v. Ritchie*, 2 All. 242, selling timber out of jurisdiction; *Obates v. McAuley*, 4 All. 521, timber cut on wild land; *Hendricks v. Titus*, 2 Han. 77, joint conversion of timber.

(d) P. 259, *supra*.

(e) *Haydon v. Crawford*, 3 O. S. 583; cf. *Campbell v. Cushman*, 4 U. C. R. 9.

(f) 5 M. L. R. 317.

(g) 21 N. S. R. 271.

(h) P. 260, *supra*.

(i) *Mason v. Morgan*, 24 U. C. R. 328.

(k) *Bowman v. Fielding*, M. T. 3 Vict. (Digest Ont. Case Law, p. 6904.)

POSSESSION: AT WHAT TIME (a).

It is sufficient to have the right to possession at the time the cause of action accrues, and not necessary to have it at the time of action brought (b). Nova Scotia.

CONVERSION BY BAILEE (c).

Where there has been a misuser of the thing lent there is an end of the bailment, and trover is maintainable (d). Nova Scotia.

INJURY TO REVERSIONARY INTEREST (e).

A., having a reversionary interest in goods, leased to B. Sheriff seized under execution against B., but did not sell or remove the goods. A. sued the sheriff for injury to his reversionary interest. Held, that if any trespass was committed by the seizure B. should sue, not A. (f). Ontario.

CONVERSION OR TRESPASS BY OWNER (g).

A person clearing land under agreement to take the wood for his labour may maintain trespass against the owner for taking away the wood when cut (h). Ontario.

CHATTEL MORTGAGE (i).

The mortgagee under a chattel mortgage has sufficient right to possession to maintain trespass against a sheriff executing a *fi. fa.* against the mortgagor (k). Ontario.

Seizure by agent of foreign mortgagee was held not a conversion, although the formalities required in executing or registering a mortgage in *Manitoba* had not been observed (l). Manitoba.

GOODS UNDER DISTRESS (m).

The plaintiff, a constable, acting under a distress warrant, had seized a horse. The horse escaped and was killed on the defendants' railway owing to their neglect to fence. Held, that the Ontario

(a) P. 262, *supra*.

(b) *Stalker v. Wier*, 2 N. S. R. 720. (James) 248.

(c) P. 263, *supra*.

(d) *Sibley v. Sibley*, 8 N. S. R. (2 Gel. & Ox.) 325.

(e) P. 264, *supra*.

(f) *Henderson v. Moodie*, 3 U. C. R. 348.

(g) P. 264, *supra*.

(h) *Hamilton v. McDonnell*, 5 O. S.

(i) P. 265, *supra*.

(k) *Porter v. Flintoff*, 6 U. C. C. P. 335. There was no re-demise clause in this mortgage allowing the mortgagor to remain in possession until default.

(l) *Bonin v. Robertson*, 2 Terr. L. R. 1893).

(m) P. 266, *supra*.

Ontario. plaintiff had sufficient property in the horse to entitle him to sue (a).

JUS TERTII (b).

Ontario. Where the defendant attempted to bring evidence to show that the goods belonged to a third person, and that a fourth had the right as landlord to follow them and seize, and that defendant seized by authority of the fourth party, it was held that the evidence was rightly rejected, and that the defence should be specially pleaded (c).

TITLE LOST (d).

Ontario. A vessel was seized under the revenue laws, and the plaintiff having failed to take the necessary steps, was condemned. Held, that by the act of seizure the plaintiff was deprived of his right of property, and therefore unable to maintain trespass (e).

DAMAGES FOR DEPRIVATION OF GOODS (f).

Ontario. Where in the removal of the plaintiff's goods by the sheriff his loom was injured and he received it back with his other goods:—Held, that he was not entitled to damages for the loss of time and work consequent on his not having repaired the loom, and that the true measure of damages could not have exceeded the value of the article damaged at the time of the trespass and compensation for any temporary inconvenience occasioned by its sudden removal (g).

British Columbia. Where goods might be replevied only nominal damages will be given for wrongful detention (h).

VALUE OF GOODS: HOW ESTIMATED (i).

Ontario. The value of the goods is to be determined upon the whole evidence, and not only by the price they may have brought at the sale (k).

WHAT JURY MAY TAKE INTO CONSIDERATION (l).

Ontario. Where a jury gave a verdict considerably below the value of the goods, it was held that the jury, with a view to damages,

(a) *Simpson v. Great Western R. W. Co.*, 17 U. C. R. 57.

(b) P. 268, *supra*.

(c) *Tyson v. Little*, 8 U. C. R. 434.

(d) P. 270, *supra*.

(e) *Dame v. Carberry*, 10 U. C. R. 374.

(f) P. 273, *supra*.

(g) *Benson v. Connor*, 6 U. C. C. P. 356.

(h) *Brown v. Jowett*, 4 B. C. R. 44.

(i) P. 274, *supra*.

(k) *Martin v. Hurlburt*, 2 A. R. 146.

(l) Pp. 274, 275, *supra*.

might take into consideration the true nature of the plaintiff's Ontario interest (a).

EFFECT OF VERDICT FOR VALUE OF GOODS.

Action for trespass for taking the plaintiff's cattle. A verdict Ontario for the value of the cattle obtained in a suit brought after that action by that defendant (the original owner) against that plaintiff will not by relation back give that plaintiff a title to the cattle so as to maintain trespass (b).

COAL: MEASURE OF DAMAGES (c).

The measure of damages for removal of coal "is the value of Nova Scotia the coal in a coalfield, which may differ altogether from its intrinsic value" (d).

SECURITIES FOR MONEY (e).

Where the obligor in a bond (securing the fidelity of a clerk) tears off the seal, although the bond might still be treated as subsisting and sufficient to sustain an action for debt, damages (in trover) may be recovered to the amount of the penalty (f).

Measure of damages in wrongful conversion of goods under bill of lading (g). Alberta and Saskatchewan.

SPECIAL DAMAGES: INTEREST (h).

In ordinary actions the measure of damages is the value of the goods when taken (which the jury may estimate liberally) and interest. It is only in a very peculiar case that such value can be exceeded, and the excess claimed must be stated as special damage (i).

SPECIAL DAMAGE: CARPENTER'S TOOLS (k).

See *Lott v. French* (l) for a case where similar evidence was Ontario rejected.

(a) *Long v. Monk*, 22 U. C. C. P. 387.

(b) *Abrams v. Moon*, 1 U. C. R. 552.

(c) P. 275, *supra*.

(d) Russell, J., in *Bartlett v. Nova Scotia Steel Co.*, 1 East. L. R. 226 (1906), following *Livingstone v. Ranyards Coal Co.*, 5 App. Cas. at p. 40.

(e) P. 275, *supra*.

(f) *Bank of Upper Canada v. Widmer*, 2 O. S. 222.

(g) See *Imperial Bank v. Hull*, 5

Terr. L. R. 313 (1902).

(h) P. 277, *supra*.

(i) *Maxwell v. Crann*, 13 U. C. R. 253. Cf. *Scott v. McAlpine*, 6 U. C. C. P. 302, value at time of conversion; *Morton v. McDowell*, 7 U. C. R. 338, ditto; *Macklem v. Durrant*, 32 U. C. R. 98, value at time of demand; *Smith v. Baechler*, 18 O. R. 293 (1889).

(k) P. 277, *supra*.

(l) 10 U. C. R. 385.

SPECIAL DAMAGE : CAPACITY FOR PROFITABLE USE (a).

Ontario. Where the defendants by breaking plaintiffs' boom lost them 125,000 feet of lumber, it was held that the plaintiffs were entitled to recover *the loss of profits* which the jury found they would have made out of the logs, there being no evidence that the plaintiffs could have purchased other logs at the time when and place where the wrong was done (b).

POSSESSION *PRIMA FACIE* EVIDENCE (c).

Manitoba. The actual possession of goods at the time, or such use and control as the nature of the subject-matter admits of, is *prima facie* evidence of ownership to found an action for damages (d).

RETURN OF CHATTEL (e).

Ontario. Where a mortgagor of a horse sold to plaintiff with oral consent of mortgagee, but mortgagee seized horse and detained it four days before returning it:—Held, damages recoverable for the detention only, not for the value of the horse (f).

DAMAGES ALTERNATIVE ON RETURN OF CHATTEL (g).

Ontario. See *Polson v. Degeir* (h).

Manitoba. For form of order where there is a dispute as to the identity of the article detained, see *Brown v. Canada Port Huron Co.* (i).

SUCCESSIVE CONVERSIONS : LIMIT OF LIABILITY (k).

British Columbia. Between the time timber is standing and the time it is finally used a number of persons may intervene. "I would not be understood as assenting to the proposition that X. can bring an

(a) P. 277, *supra*.

(b) *Auger v. Cook*, 39 U. C. R. 537.
Cf. *Flint v. Bird*, 11 U. C. R. 444;
Brown v. Beatty, 35 U. C. R. 328;
Cockburn v. Muskoka Mill and Lumber Co., 13 O. R. 343.

(c) P. 278, *supra*.

(d) *Gaudry v. Canadian Pacific R. W. Co.*, 11 M. L. R. 69, case of hay cut and stacked without leave on Crown lands.

(e) P. 281, *supra*.

(f) *Loucks v. McSloy*, 29 U. C. C. P. 54.

(g) See p. 281, *supra*.

(h) 12 O. R. 275, illegal detention of machinery : judgment that if not given up defendants pay \$650 with interest ; if given up plaintiffs pay \$60 for repairs.

(i) 2 West. L. R. 151 (1903), portable fire engine. Cf. *Pearce v. Hart*, 1 West. L. R. (N. W. T.) 476 (1905). identity of colt.

(k) P. 282, *supra*.

action against A. who fells his timber, B. who carries it off, British C. who manufactures it into lumber, D. the proprietor of the Columbia. planing mill, E. the furniture maker, F. the retail trader, G. the purchaser, H. the transferee, and so on. If this were so, a plaintiff could overwhelm with litigation *ad infinitum* a whole community, the different members of which were in total ignorance of the acts of the others. The taint of tort must stop somewhere, and in my opinion, if the chattel sold has been essentially changed, the first innocent transferee after alteration stops the chain of liability" (a).

MEASURE OF DAMAGES WHERE TRESPASS JOINT (b).

In joint trespass each defendant is liable for the damage Ontario. occasioned to the plaintiff by the joint act, and the Court will not interfere because as regards one the verdict may be excessive (b).

(a) Hunter, C.J., in *Rogers v. Frechette*, 1 West. L. R. 190 (1905).

(b) *Grantham v. Severs*, 25 U. C. R. 468.

CHAPTER XII.

DISTRESS.

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Distress, what it is. DISTRESS is a remedy given by the common law, whereby a party in certain cases is entitled to enforce a right or obtain redress for a wrong in a summary manner, by seizing chattels and retaining them as a pledge until satisfaction is obtained.

Distress for rent. The most important head of distress is for rent, whether it be the return due from the tenant holding the land to the lord of whom it is held, or an annual sum charged on the land in favour of a person who, apart from such rent, has nothing further in the

Rent-charges. land. Rents of the latter kind were known as rent-charges or rents-seck, according as the power of distress was incident to them or not, but now by statute the distinction is abolished, and all such rents may be distrained for as rents reserved on lease (a). It has been said that neither a rent-charge nor a rent-seck can be created by a person having an interest less than freehold (b).

Rent service. The former kind is known as rent-service. It includes ancient quit rents created before the statute of *Quia Emptores*, copyhold rents, rents payable in respect of enfranchised copyholds (c), and rents incident to a reversion, or, which is practically the same thing, rents reserved by lease. With regard to this kind of rent, it is impossible here to deal at large with the law of landlord and

(a) 4 Geo. II. c. 28, s. 5. See too 44 & 45 Vict. c. 41, s. 44.

(b) — v. *Cooper*, (1768) 2 Wils. 375 ; followed *Langford v. Selmes*, (1857) 3 K. & J. 220. See, however, *Butt's case*, (1600) 7 Rep. 23a.

(c) 6 & 7 Vict. c. 23, s. 2. That rent, however, is spoken of throughout the Copyhold Acts as a rent-charge. As to tithe rent-charge, see 6 & 7 Will. IV. c. 71, s. 81, and 54 Vict. c. 8, ss. 1 and 2.

tenant; it is enough to say for the right of distress to exist there must in the first place be an actual occupation of land by the tenant, not a mere incorporeal right in the land (a); there must be a certain rent—the consideration for the use of the land in money, kind or actual service (b) must be ascertained by the terms of the demise itself, or ascertainable on some definite principle, as in the case of royalties (c); and finally the relation of landlord and tenant must exist in the full sense of the term at the time of the distress. Mere use and occupation, or a tenancy on sufferance, can give no right to distrain; there must be at the very least a tenancy at will (d). But an express power in a mining lease for a landlord to distrain for rent in arrear on chattels belonging to his tenant situated in mines adjacent to that actually demised has been decided by the Court of Appeal to confer a right of distress on the chattels in such neighbouring mines, provided the workings in the adjacent properties are on the same seam of coal as that in the mine demised, with which therefore they might be connected underground (e). A receiver appointed by the Court may distrain, but if the tenant has not attorned to him it must be in the name of the person who has the legal estate (f). But if a lessee with an original lease and a reversionary lease, or an agreement therefor, sub-lets the premises for a term exceeding the original demise, he cannot distrain for rent during the currency of the original lease either at common law or by statute (g). In the case where a man entered under an instrument void as a lease, because not in accordance with statutory requirements, it was formerly clear that until he paid rent no tenancy existed, and therefore no right of distress (h). It is said now, however, that mere entry under an agreement for a lease of which specific

(a) *Hancock v. Austin*, (1863) 14 C. B. N. S. 634; and cp. *Selby v. Greaves*, (1868) L. R. 3 C. P. 594.

(b) For a modern case of a tenancy by actual service, see *Doe v. Benham*, (1845) 7 Q. B. 976.

(c) *Daniel v. Gracie*, (1844) 6 Q. B. 145; *Selby v. Greaves*, *supra*.

(d) *Williams v. Stiven*, (1846) 9 Q. B. 14; *Anderson v. Midland R. Co.*, (1861), 3 B. & E. 614; *Scobie v. Collins*, (1895)

1 Q. B. 375.

(e) *Roundwood Colliery Co., In re, Lee v. Roundwood Colliery Co.*, (1897) 1 Ch. 373, C. A.

(f) *Hughes v. Hughes*, (1790) 3 Bro. C. C. 87; 1 Ves. jun. 161; *Bennett v. Robins*, (1832) 5 C. & P. 379.

(g) *Lewis v. Baker*, (1905) 1 Ch. 46.

(h) *Hegan v. Johnson*, (1809) 2 Taunt. 148; *Dunk v. Hunter*, (1822) 5 B. & Ald. 322.

performance may be claimed creates of itself a legal tenancy (a). If a tenant holds over after the termination of his lease, with no recognition on the part of his landlord beyond bare sufferance, rent due under the lease at common law cannot be distrained for, because there is no longer a real tenancy (b). But by statute (c) the landlord may distrain during a period of six months subsequent to the lease, provided his title and the possession of the tenant both continue (d). If an agricultural tenant has a right under his lease to occupy part of the premises for harvesting purposes after the date of quitting, this is a continuation of the term, and not a tenancy on sufferance (e). It would seem that the statute does not apply where the landlord on a forfeiture has made a formal entry or brought ejectment (f).

Distress by agreement.

Although only rent, strictly speaking, can be distrained for, yet by the agreement of the parties there may be a right of distress as for rent in respect of any due. For example, a mortgagor in possession, without attorning to the mortgagee, can covenant with him that he may distrain for interest (g). But of course such a contract cannot affect the rights of those who are strangers to it (h). It was held, however, in *Daniel v. Stepney* (i), that where a lessee had granted a right of distress over land not included in the demise, the right held good against the assignees of such land who took it with notice. Whether such a right of distress, though valid against a subsequently appointed receiver on behalf of mortgagees (k), would be so as against strangers is not actually decided in terms, although it probably would be so. In *Tadman v. Henman* (l), it was held that a person who lets premises to which he has no

(a) *Walsh v. Lonsdale*, (1822) 21 Ch. D. 9, C. A.

(b) *Williams v. Stiren*, *supra*.

(c) 8 Ann. c. 14, ss. 6, 7.

(d) As to what is occupation to satisfy the statute, see *Taylorson v. Peters*, (1837) 7 A. & E. 110; *Nuttall v. Staunton*, (1825) 4 B. & C. 51. The statute does not apply where the tenant remains in possession of part of the premises under a new tenancy (*Wilkinson v. Peel*, (1895) 1 Q. B. 516).

(e) *Beavan v. Delahay*, (1788) 1 H.

Bl. 5; *Knight v. Bennett*, (1826) 11 Moore, 227.

(f) *Per Willes, J., Grimwood v. Moss*, (1872) L. R. 7 C. P. p. 365.

(g) *Chapman v. Beecham*, (1842) 3 Q. B. 723.

(h) *Freeman v. Edwards*, (1848) 2 Ex. 732.

(i) (1874) L. R. 9 Ex. 185.

(k) And see *supra*, *Roundwood Colliery Co., In re*.

(l) (1893) 2 Q. B. 168.

title cannot distrain upon goods which are the property of third persons who do not claim any possession of or interest in the premises under the tenant, and which are upon the premises by the tenant's licence. The estoppel which prevents the tenant from disputing the title of the landlord does not extend to strangers in such a case.

A right of distress is barred altogether if not exercised within twelve years of the time when it first accrued, and the right of distraining for any particular sum is barred within six years of the time when it first accrued or was acknowledged in writing (a). In the case of tenancies under the Agricultural Holdings Act no rent can be distrained for which has been due more than a year, unless where it has been customary for the landlord to allow a postponement for a half-year or a quarter, and then the period of limitation is to run from the postponed date (b).

Right of distress when barred.

Assuming a party to show a *prima facie* title to distrain, which is a question of the law of property, he will nevertheless be liable in an action when the distress is illegal, irregular or excessive.

Illegal, irregular and excessive distress.

A distress may be absolutely illegal in a variety of ways: if made after tender, if after a previous distress (c), if it be made at the wrong place or time, if the manner of entry be wrongful, if goods are taken which the law protects from distress (d), if the distress is made contrary to agreement or by taking advantage of the distrainer's own wrong, and if made by unqualified persons (e). There are, moreover, certain special cases in which distress is not allowed.

Various kinds of illegal distress.

1. It is, of course, obvious that no one can be justified in distraining when without distraining he is able to obtain everything to which he is entitled. To complete a distress there must be a taking and an impounding (f). Before the taking the party liable may tender the amount for which there is a right to distrain, and after such tender the taking is a trespass. If between the taking and the impounding he make a sufficient

After tender.

(a) 3 & 4 Will. IV. c. 27, s. 42; 37 & 38 Vict. c. 57, s. 1.

(b) 46 & 47 Vict. c. 61, s. 44.

(c) Though in this case if the first distress amount to a trespass *ab initio*, a second and valid distress is justifiable, *Grunnell v. Welch*, (1905) 2 K. B. 650.

(d) See *Secretary of State for War v. Wynne & Others*, (1905) L. T. Paper, Nov. 4th, p. 10.

(e) *Perring & Co. v. Emerson's Law Times Paper*, (1905) Nov. 4th, p. 10.

(f) As to impounding, see below, pp. 305 *sqq.*

tender he has a right to obtain his goods back again ; after the impounding the tender is too late (a). Nevertheless, if it be in fact accepted the goods ought to be restored, and although the mere keeping them may not be actionable a refusal to deliver them or a dealing with them inconsistent with the right of the distrainee may afford a cause of action (b).

Tender of expenses.

Remedy for rent not suspended by giving negotiable security.

No set-off against rent.

Certain deductions allowed.

A landlord may charge the reasonable expenses of his distress, and therefore after seizure such expenses must be included in the tender, but before seizure it is sufficient if the rent actually in arrear be tendered (c). The mere fact that a note or bill has been given in respect of rent in arrear does not *ipso facto* operate as a suspension of the right of distress (d), but it is evidence of an agreement to suspend such right during the currency of the note or bill (e). On the same principle there is no general right of set-off against rent (f). If, however, an under-tenant, on compulsion pay rent to the superior landlord, this is considered a payment on account which he is entitled to deduct from the next rent which becomes due to his immediate landlord (g). So, too, a tenant may deduct payments which he has been compelled to make on account of rates and taxes, chargeable on the landlord by the terms of the demise (h). In the case of payments made by the tenant on account of the landlord's property tax he may make the deduction from the next instalment of rent, any agreement to the contrary notwithstanding (i). And tenants who are called upon to pay arrears due from former occupiers are entitled

(a) *Six Carpenters' case*, (1610) 8 Rep. p. 147a ; *Gulliver v. Cosens*, (1845) 1 C. B. 788. It is said in *Evans v. Elliott*, (1836) 5 A. & E. 142, that the wrongful detaining of goods after a tender is of itself a trespass, but this does not seem in accordance with the views expressed in *Gulliver v. Cosens*, *supra*, and *West v. Nibbs*, (1847) 4 C. B. 172. If the mere detention is not actionable, the distrainee ought, it would seem, at the time of tender to make a demand, the refusal of which would give good evidence of a conversion. It is only where the original taking is unlawful that the distress is illegal. Anything afterwards is an irregularity. See below, pp. 305 *seq.*

(b) *West v. Nibbs*, *supra*.

(c) *Bennett v. Bayes*, (1860) 5 H. & N. 391.

(d) *Davis v. Gyde*, (1833) 2 A. & E. 623.

(e) *Baker v. Walker*, (1845) 14 M. & W. 465 ; *Palmer v. Bramley*, (1895) 2 Q. B. 405.

(f) *Andrew v. Hancock*, (1819) 1 B. & B. 37.

(g) *Carter v. Carter*, (1829) 5 Bing. 406.

(h) *Palmer v. Earith*, (1845) 14 M. & W. 428.

(i) 5 & 6 Vict. c. 35, ss. 60, 103. See *Denby v. Moore*, (1817) 1 B. & Ald. 123 ; and see 16 & 17 Vict. c. 34. s. 40.

to deduct the amount from their rent (a). By 46 & 47 Vict. c. 61, s. 47, an agricultural tenant is entitled to set off any ascertained amount of compensation due under the Act by custom or contract against rent, and the landlord can only distrain for the balance. Set-off in agricultural tenancies.

A tender should, of course, be continuing, though if a landlord refuse an adequate and unconditional tender, he may thereby lose his right to distrain. But a mere attendance on the land to pay rent, without actual tender, does not avoid the landlord's right (b). A tender may always be made either to the landlord or to the person to whom the distress warrant is directed. In any other case an actual authority to receive the money must be proved (c).

2. It would be an obvious hardship for a landlord unnecessarily to multiply distresses. Therefore, if after putting in a distress and having had an opportunity of realising his rent, he has neglected to do so, his remedy by distress is gone, and he is put to his action. If he distrains again he will be a mere trespasser (d). When, however, the original entry is a trespass *ab initio*, a second and valid distress is justifiable (e). And if on distraining first he cannot find enough to satisfy his claim he may either abandon (f) the distress altogether and subsequently distrain for the whole amount, or realise what he can and distrain for the residue (g). If a reasonable explanation be given of the abandonment, or inadequate execution, of a distress, it is no bar to another, even though it appear that there were enough goods on the premises to satisfy the claim. If the tenant has done anything equivalent to saying, "Forbear to distrain now, and postpone your distress to another time," or, if the lessee Repeated distresses.

(a) 16 & 17 Vict. c. 34, s. 35.

(b) *Horne v. Lewin*, (1700) Lord Raym. 639.

(c) *Smith v. Goodwin*, (1883) 4 B. & Ad. 413; *Hatch v. Hale*, (1850) 15 Q. B. 10.

(d) In such a case, however, though the tenant has his action of trespass, he cannot replevy successfully, because the fact of rent being due would be an answer (*Hudd v. Ravenor*, (1821) 2 B. & B. 662).

(e) *Grunnell v. Welch*, (1905) 2 K. B. 650.

(f) As to abandoning a distress, see *Smith v. Goodwin*, (1833) 4 B. & Adol. 413; 38 R. R. 272; *Swann v. Earl of Falmouth*, (1828) 8 B. & C. 456, and below, p. 294.

(g) *Dawson v. Cropp*, (1845) 1 C. B. 961; *Hutchins v. Chambers*, (1758) 1 Burr. 579, at p. 589. A point may arise as to whether a distrainer in computing the sufficiency of a distress on a question of abandonment is bound to take into calculation the growing crops. It would seem that he is not. See *Piggott v. Birtles*, (1836) 1 M. & W. 441. When second distress lawful after first abandoned.

prevents the lessor making the first distress available, in either of such cases the landlord may distrain a second time (*a*), provided that in the interim the property in the goods has not passed to a trustee in bankruptcy (*b*). Where, after a sale of distrained goods the distrainee refused to let the purchaser take possession, it was held that the sale might be rescinded and a second distress levied (*c*).

Separate
distresses
for separate
instalments
of rent.

It is to be observed that it is not necessary to distrain at once for all the arrears that may happen to be due. A demand may not be split (*d*), but for several instalments there may be several distresses (*e*). And for the same instalment there may be different distresses when the right has become vested in different hands, as by an apportionment of rent or a division of a rent-charge (*f*).

Where
distress to be
taken.

3. Both by common law and statute (*g*) a distress can only be taken from the premises out of which the rent issues (*h*). Conversely, to give a right of distress for an annual payment is to make it a charge on the land in respect of which the distress is given (*i*). If the occupier of the land subject to rent enjoys in connection with it any easement in the nature of a right of way his chattels are not distrainable while on the servient premises (*k*). It is expressly forbidden by the statute above referred to to distrain on the highway. It was held, indeed, in *Hodges v. Lawrance* (*l*) that a distress might be taken on that part of a highway adjoining the demised premises, the presumption being that they extended to the middle of the highway. The sole point, however, argued in the case was as to the true boundary of the premises. A passage in Co. Litt. (*m*) is directly to the contrary

Distress on
highway.

(*a*) *Per Cur. Bagge v. Mawby*, (1853) 8 Ex. p. 649; *Lee v. Cooke*, (1858) 27 L. J. Ex. 337; and see *per Cur. Hutchins v. Chambers*, (1758) 1 Burr. p. 589; *Thwaites v. Wilding*, (1883) 11 Q. B. D. 421; 12 Q. B. D. 4.

(*b*) *Ford, In re*, (1900) 69 L. J. Q. B. 74.

(*c*) *Lee v. Cooke*, (1857-8) 2 H. & N. 584; 3 H. & N. 203.

(*d*) *Owens v. Wynne*, (1855) 4 E. & B. 579.

(*e*) *Gambrell v. Earl of Falmouth*,

(1835) 4 A. & E. 73; *Owens v. Wynne*, (1855) 4 E. & B. 579.

(*f*) *Ritis v. Watson*, (1839) 5 M. & W. 255.

(*g*) 52 Hen. III. c. 15.

(*h*) Except by the Crown, as to which see Chitty on Prerogative, p. 208.

(*i*) *Butt's Case*, (1600) 7 Rep. p. 24a.

(*k*) *Buszard v. Capel*, (1828-9) 8 B. & C. 141.

(*l*) (1854) 18 J. P. 347. See *Gillingham v. Gwyer*, (1867) 16 L. T. N. S. 640.

(*m*) p. 161a.

effect. "If the rent of the land is behind, and the lord distrain the cattle of the tenant upon the highway within his fee, the tenant may make rescous, for that it is forbidden by law to distrain in the highway." It is said, however, that if a distress is objectionable only on the ground that it is taken on the highway it is not altogether illegal, but a special action on the statute must be brought (a).

There are cases in which land not subject to a rent may yet be subject to a distress. A man may charge a rent on one piece of land, and give the grantee a right in default of sufficient distress there to distrain on another piece of land (b). So, a right may be given to the tenant of land subject to a charge, in case he is distrained on to indemnify himself by distraining on other land (c). It has, however, never been held that in case of a rent service there can be any distress in the true sense, that is to say, valid against strangers to the demise, except on the premises out of which the rent issues (d).

Distress on land other than that from which rent issues.

If the person coming to make the distress finds the tenant in the act of removing his chattels for the purpose of avoiding the distress, he may follow them off the land and take them on a fresh pursuit (e).

Removal to avoid distress.

Fresh pursuit.

By 11 Geo. II. c. 19, s. 8, landlords and lessors may distrain cattle and stock of their tenants depasturing on any common belonging to the demised premises. By s. 1 of the same statute they may distrain goods fraudulently or clandestinely removed from the demised premises within thirty days of the removal, wherever they may be found. These provisions are only in favour of landlords, and by the terms of the statute it appears that they do not apply except in case of a rent reserved on a lease.

Cattle may be distrained on common.

Goods fraudulently removed.

The goods removed must be those of the tenant himself; other parties may lawfully withdraw their goods from the reach of the landlord (f). If the grantee of a bill of sale given by the tenant

Goods of stranger cannot be followed.

(a) Gilbert on Distress, 4th ed. p. 51.

(b) *Butt's case*, (1600) 7 Rep. 23a; Co. Litt. p. 147a.

(c) See Bythewood & Jarman's Conveyancing, 4th ed. Vol. 2, p. 939.

(d) The point was argued but not decided in *Daniel v. Stepney*, (1874)

L. R. 9 Ex. 185, where it was held that a power of distress outside the demised premises given by a lease was good against assignees with notice.

(e) Co. Litt. 161a. *Per Cur. Rand v. Vaughan*, (1835) 1 Bing. N. C. p. 769.

(f) *Thornton v. Adams*, (1816) 5

removes goods comprised in the bill of sale in order to avoid a distress, the landlord will have no right of action against him even though the provision of s. 13 of the Bills of Sale Act, 1882, which requires that the chattels seized shall not be removed or sold for five days, has not been complied with (a).

Rent due.

Rent must be due at the time of removal (b), but need not be in arrear. Therefore goods which are moved on the morning of rent-day may on the next day be followed (c), although at the time of the removal they were not liable to distress (d).

Intent must be fraudulent.

The removal must not merely be with the intent of defeating the distress, but with the fraudulent intent of so doing. It is not fraudulent if the tenant prefers to use the goods in satisfying the claim of a *bonâ fide* creditor in preference to that of his landlord (e). Although secrecy is a badge of fraud there may be fraud without secrecy; however openly the goods are removed they may be followed if the intent was fraudulent (f).

Bonâ fide purchaser.

The goods removed cannot be followed into the hands of a *bonâ fide* purchaser (g).

Goods cannot be followed when tenancy at an end.

If before the thirty days have elapsed the tenancy determines and the occupation ceases the right to distrain is gone, for the object of the statute was to enlarge the landlord's remedy in respect of place but not of time (h).

Forcible entry to take goods.

The statute gives power to make forcible entry for the purpose of recovering the goods fraudulently removed, provided that in every case the party making entry is accompanied by a constable of the locality (i), and in case of entry on a dwelling-house, that it is made in the daytime, and oath is made before a justice of

M. & S. 38; *Tomlinson v. Consolidated Credit & Mortgage Corporation*, (1889) 24 Q. B. D. 135.

(a) *Tomlinson v. Consolidated Credit & Mortgage Corporation*, (1889) 24 Q. B. D. 135; *Lane v. Tyler*, (1887) 56 L. J. Q. B. 461.

(b) *Rand v. Vaughan*, (1835) 1 Bing. N. C. 767.

(c) *Dibble v. Bowater*, (1853) 2 E. & B. 564. Rent is due on the first moment of the rent day; it is only in arrear on the first moment of the next day.

(d) See below, p. 293.

(e) *Bach v. Meats*, (1816) 5 M. & S.

200. And if the goods are removed to avoid a distress which is honestly believed to be illegal, this, it seems is not a fraudulent removal; *John v. Jenkins*, (1832) 1 C. & M. 227.

(f) *Opperman v. Smith*, (1824) 4 D. & R. 33; *Stanley v. Wharton*, (1821-2) 9 Price, 301.

(g) s. 2.

(h) *Gray v. Stait*, (1879) 11 Q. B. D. 668.

(i) A special constable will suffice: *Cartwright v. Smith*, (1833) 1 Moo. & R. 284.

the peace that there is reasonable ground to suspect that the goods are therein (a). The statutory requirements must be strictly complied with or the entry will be unlawful (b). There is nothing in the enactment to give protection in case the goods are not actually found on the premises when entry is made.

4. Distress for rent can only legally be made between sunrise and sunset (c), and it would seem that the time must be fixed by the apparent rise and set and not by astronomical calculation (d). A distress cannot be taken until the day after the rent falls due (e). There is apparently no reason why a distress for rent should not be levied on a Sunday (f).

Time of distress.

5. It is illegal to enter forcibly for the purpose of distraining (g). The rules which have been laid down on this subject are not very clear or consistent, and differ in some respects from those with regard to executions. The general principle seems to be that the entry must be made in the accustomed mode of obtaining admittance, as for example by lifting the latch of the door (h). It has been held, however, that though it is not lawful to lift an unfastened window, yet if the window be partially open it may be further raised and an entry thus made. It can hardly be said that this is a normal method of admittance (i). In *Gould v. Bradstock* (k) the landlord occupied a room over his tenant, separated only by a boarding. He raised the boards, entered, and distrained, and it was held that this highly unusual entrance was lawful, on the curious ground that he was tenant in common of the boards, and therefore committed no trespass in raising them. If an admittance is lawfully obtained inner doors may be afterwards broken open to find the goods (l). The rule as to

Manner of entry.

Inner doors.

(a) s. 7. It is usual for a magistrate to give a written authority, but the Act does not require it.

(b) *Rich v. Woolley*, (1831) 7 Bing. 651.

(c) *Tutton v. Darke*, (1860) 5 H. & N. 647; Co. Litt. 142a.

(d) But see 43 & 44 Vict. c. 9.

(e) Co. Litt. p. 47b.

(f) In *Werth v. London and Westminster Loan & Discount Co.*, (1889) 5 Times L. R. 521, Mathew, J., is indeed reported to have assented to the suggestion of counsel that a distress levied on

Sunday would be illegal. But he gave no reason for his view, nor was the point necessary to the decision. Nor apparently is distress within 29 Car. II. c. 7, s. 6.

(g) *Grunnell v. Welch*, (1905) 2 K. B. 650.

(h) *Ryan v. Shilcock*, (1851) 7 Ex. 72.

(i) *Crabtree v. Robinson*, (1885) 15 Q. B. D. 312; and see *Tutton v. Darke*, *supra*.

(k) (1812) 4 Taunt. 562.

(l) Buller, N. P. p. 81c.

the manner of entry requires not merely a peacefulness but also a non-violence of execution. Entry is instantaneous. In *Eldridge v. Stacey* (7) the tenant climbed a wall into a back yard and entered by passing the back of the back door. It was held that the distress was lawful but four years later *Lyde, J.*, after consulting the judges of the same Court on a similar state of facts, held the entry unlawful. The latter case, however, was not followed and *Eldridge v. Stacey* was approved by the Court of Appeal in the modern case of *Long v. Christie* (8).

Entry by force.

What may be taken.

If a peaceful entry is once made the person distraining may subsequently re-enter, if necessary by force, for the purpose of carrying out the distress, unless in the meantime it has been abandoned (9). It is not necessarily an abandonment if the goods are left impounded on the premises with no one in charge (10). *A fortiori* if the man in possession is expelled by force or fraud he may subsequently re-enter with the strong hand; but this right must be exercised in a reasonable manner, for long delay will be evidence of abandonment. In *Eldridge v. Stacey* (7) it was held a question for the jury whether a delay of three weeks after an expulsion amounted to an abandonment.

What may be taken.

6. As a general rule all property found on the premises subject to the distress is liable to be taken without reference to the rights of third parties (11), though it has been held that a purely personal licence to use a patented article distrained upon is not communicable to a third party, being a right of an incorporeal nature (12).

(a) *Brown v. Glenn*, (1851) 16 Q. B. 254. The law with regard to executions is different. See Ch. XXII.

(b) (1863) 15 C. B. N. S. 458.

(c) *Scott v. Buckley*, (1867) 16 L. T. N. S. 573.

(d) (1894) 1 Q. B. 119.

(e) *Fagleton v. Gutteridge*, (1843) 11 M. & W. 465. It is not an entry if a man just gets part of his body inside (*Boyd v. Profaze*, (1867) 16 L. T. N. S. 431).

(f) *Jones v. Biernstein*, (1900) 1 Q. B. 100; *Swann v. Earl of Falmouth*, (1828)

8 B. & C. 456; *Bannister v. Hyde*, (1860) 2 E. & E. 627.

(g) (1853) 15 C. B. N. S. 458.

(h) It was at one time supposed that there was a less extensive right of distress in case of a rent-charge (Com. Dig. Distress, B. 2). But this is not so (*Saffery v. Elgood*, (1834) 1 A. & E. 191; and *Johnson v. Faulkner*, (1842) 2 Q. B. 925). Certain statutes, however, as will be pointed out, give special rights to landlords only.

(i) *British Mutoscope Co. v. Homer* (1901) 1 Ch. 671.

Beside this unusual incident, there are, however, several exceptions to the general rule stated above.

(a.) In the first place there is no right of distress against the property of the Crown or ambassadors of foreign powers (a).

Exceptions.

Crown and foreign envoys.

(b.) Secondly, for the benefit of commerce things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ, are privileged (b). There must have been a delivery of the things, a transfer of possession to the person on whose premises they are seized. Where a shipbuilder was constructing a vessel under a contract by which the property in the hull vested in his employer before delivery, and it was distrained upon in his yard, it was held that there was no privilege (c). The person to whom the delivery is made must exercise a public trade, not in the sense that he is bound to deal with all the world, but in the sense that he keeps open shop or holds himself out as ready to do business with the public generally. It was held, indeed, in *Rede v. Burley* (d) that goods taken to a weighing machine which a man kept for his own private use were privileged; this case, however, seems inconsistent with all the other authorities (d). But if the business is public in its character the extent to which it is carried is immaterial (e). As a general rule the goods must not only be in the possession of some public trader, but at some place where he carries on business. Goods in the hands of an auctioneer conducting a sale at a private house are not privileged (f). To this there is an exception in favour of carriers; for goods in their

Things delivered in the way of trade.

Public trade.

(a) *Secretary of State for War v. Wynne & others*, Law Times Paper, Nov. 4th, 1905, p. 10; and see below, p. 304.

(b) *Simpson v. Hartopp*, (1743) Willes, 512.

(c) *Clarke v. Milwall Dock Co.*, (1886) 17 Q. B. D. 494.

(d) (1597) Cro. Eliz. 596. See particularly *Crosier v. Tomkinson*, (1759) 2 Kenyon, 439, where horses at a stable lent *pro hac vice* were held distrainable. In *Gisbourn v. Hurst*, (1709) 1 Salk. 249, the privilege was that of the carrier not of the premises. If a man agist cattle once in a way such cattle at common law are not protected; but it might be

different if he made a business of agisting. See *per Mellor, J., Miles v. Furber*, (1873) L. R. 8 Q. B. p. 83.

(e) *Gibson v. Ireson*, (1842) 3 Q. B. 39. For instances of public trades, see *Findon v. M'Laren*, (1845) 6 Q. B. 891 (commission agent); *Adams v. Grane*, (1833) 1 C. & M. 380 (auctioneer); *Gilman v. Elton*, (1821) 3 B. & B. 75 (factor); *Brown v. Sherill*, (1834) 2 A. & E. 138 (slaughterman); *Wood v. Clarke*, (1831) 1 C. & J. 484 (weaver); *Swire v. Leach*, (1865) 18 C. B. N. S. 479 (pawnbroker); *Miles v. Furber* (1873) L. R. 8 Q. B. 77 (warehouseman).

(f) *Lyons v. Elliott*, (1876) 1 Q. B. D. 210.

hands for the purpose of transit cannot be seized on premises where they may be temporarily deposited (a).

For purpose
of trade.

The goods must be delivered for the purpose of being carried, wrought, worked up, or managed. Under the word management is included the custody of innkeepers, pawnbrokers, and warehousemen (b). It was held, indeed, in *Parsons v. Gingell* (c), that horses at livery are liable to distress, but this case has been disapproved of (d). The object of the delivery must be that the person to whom they are delivered should exercise his trade upon them. In *Wood v. Clarke* (e), yarn was delivered to a weaver, and a loom was lent him to do his work. It was held that the yarn was privileged, but not the loom. In *Muspratt v. Gregory* (f), a barge was sent to a manufacturer's premises by a purchaser to be loaded with his goods: it was held not privileged. In *Joule v. Jackson* (g), the plaintiff had supplied beer to an innkeeper in barrels belonging to the plaintiff, which were distrained at the inn. The distress was held lawful. In all these cases the goods were delivered not to be dealt with in the way of trade, but in order to facilitate the operations of the trade. But, on the other hand, it has been held that a sewing machine in the possession of a tenant, under a hire-purchase agreement, and used by his wife for the support of the family, is privileged from distress by 51 & 52 Vict. c. 21, s. 4 (h).

Things
accessory to
privileged
goods.

It was said in *Rede v. Burley* (i) that the horse or vehicle which either takes or is sent for privileged goods is itself privileged. But this is now overruled (k). It may be, however, that anything which is purely accessory to the privileged goods at the time of seizure is itself privileged. Thus the case or vehicle or vessel in which the goods are may be protected (l). If a saddled horse is taken to a farrier to be shod, the saddle cannot be seized while it is on the horse; but if it be taken off him, it may then

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| (a) <i>Gisbourn v. Hurst</i> , <i>supra</i> , p. 295. | M. & W. 677. |
| (b) <i>Crosier v. Tomkinson</i> , <i>supra</i> ;
<i>Swire v. Leach</i> , <i>supra</i> ; <i>Miles v.</i>
<i>Furber</i> , <i>supra</i> , p. 295. | (g) (1841) 7 M. & W. 450. |
| (c) (1847) 4 C. B. 545. | (h) <i>Masters v. Fraser</i> , (1902) 85 L. T.
611; 66 J. P. 100. |
| (d) See <i>per</i> Cockburn, C.J., <i>Miles v.</i>
<i>Furber</i> , (1873) L. R. 8 Q. B. p. 82. | (i) (1597) Cro. Eliz. 596. |
| (e) (1831) 1 C. & J. 484, <i>supra</i> . | (k) <i>Muspratt v. Gregory</i> , (1836-8)
<i>supra</i> . |
| (f) (1836-8) 1 M. & W. 633; 3 | (l) <i>Per</i> Alderson, B., <i>Muspratt v.</i>
<i>Gregory</i> , (1836) 1 M & W. p. 647. |

be distrainable (a). A distrainor had no right at common law to sever one thing from another, because he could not return them in the same condition; therefore if he found a horse harnessed to a cart, he could not take one without the other (b).

(c.) In addition to things within the rule in *Simpson v. Har-
topp* (c), there is a special privilege attaching to goods in a public fair or market, or on their way thither, for the purposes of sale. If a man driving his beast to market agists them for the night before the market in a field, the landlord cannot distrain. The occupier of the field clearly does not come within the definition of a person to whom goods are delivered in the way of his trade, but the privilege is the privilege of the market (d).

Goods on way
to fair or
market.

(d.) Besides the common law exemptions, by 6 & 7 Vict. c. 40, s. 18, any apparatus or materials in certain textile manufactures entrusted to workmen shall not be distrained except for rent due by the owner.

Textile
machinery
and materials.

(e.) By 35 & 36 Vict. c. 50, ss. 3, 5, railway rolling stock, if sufficiently marked with the owner's name, is protected from distress on works connected with the railway by sidings, except to the extent of any interest which the tenant of the works may have in such stock.

Rolling
stock.

(f.) By 46 & 47 Vict. c. 61, s. 45, on agricultural holdings as defined by the Act, hired machinery, and stock sent solely for breeding purposes, are absolutely protected. Agisted (e) cattle may not be taken except no other sufficient distress can be found, and then only to the extent of the tenant's interest.

Agricultural
machinery
and breeding
stock.

Agisted
cattle.

(g.) Another case in which protection is given to the goods of strangers is by the Lodgers' Goods Protection Act (34 & 35 Vict. c. 79). If the goods of a lodger are taken under a distress levied on his immediate landlord by the superior landlord, he may serve on the distrainor an inventory and declaration in the form prescribed (f) and pay him any rent due from him to the extent

Lodgers'
goods.

(a) *Per* Brian, C.J., 22 Edw. IV. 50, pl. 15.

(b) *Per* Brian, C.J., 20 Edw. IV. 3, pl. 16, and see Vin. Abr. tit. Distress.

(c) (1743) Willes, 512.

(d) *Nugent v. Kerwin*, (1838) 1 Jebb & Symes, 97. *Per* Alderson, B., *Muspratt v. Gregory*, (1836) 1 M. & W.

p. 647; Co. Litt. p. 47a. But see Bac. Ab. Distress B.

(e) See *London & Yorkshire Bank v. Belton*, (1885) 15 Q. B. D. 457.

(f) As to sufficiency of this, see *Ex parte Harris*, (1885) 16 Q. B. D. 130; *Thwaites v. Wilding*, (1883) 11 Q. B. D. 421; 12 Q. B. D. 4. As to who is a

of the distrainer's claim. If the distress is after this proceeded with, an action for illegal distress lies (a), not only against the landlord but also against the bailiff (b). It is to be observed that this Act gives no protection except in case of a distress for rent on a demise.

Goods in
custody of
law.

(h.) Under this head also, of protection to the rights of third parties, may be considered the privilege of things in the custody of the law (c). Goods are in the custody of the law when an officer of the law is in lawful possession of them under a legal process, or when they have been lawfully distrained upon and not abandoned; and, as will be seen hereafter, in case of distress the goods, after impounding, are in the custody of the law, even though it may turn out that the distress was altogether illegal (d). It has, however, been held by the Court of Appeal in Ireland that a landlord's claim for twelve months' rent, actually in arrear, takes priority, after notice, to a seizure in execution by a special bailiff (e). Where growing crops are sold in an execution they are, in the hands of the vendee, privileged from distress until they can be harvested (f). However, by 14 & 15 Vict. c. 25, s. 2, in such a case the landlord may seize for subsequently accruing rent, provided he can find no other sufficient distress (g).

There are several cases in which goods are protected from distress even though they are the property of the distrainee.

Things in
use.

(a.) Things in actual use are privileged from distress on the grounds of the general danger to the peace which would ensue from attempts to seize them. Therefore a tool or machine which a man is working with, or a horse which he is leading, riding, or driving, cannot be distrained (h). If, however, they were not in actual use, the privilege at common law was conditional upon there being other goods of sufficient value upon the premises (i).

lodger, see *Phillips v. Henson*, (1877) 3 C. P. D. 26; *Ness v. Stephenson*, (1882) 9 Q. B. D. 245; *Heauwood v. Bone*, (1884) 13 Q. B. D. 179; *Morton v. Palmer*, (1881) 51 L. J. Q. B. 7.

(a) *Godlonton v. Fulham & Hampstead Property Co.*, (1905) 1 K. B. 431.

(b) *Lowe v. Dorling & Son*, (1905) 2 K. B. 501.

(c) Co. Litt. p. 47a.

(d) See below, p. 317.

(e) *Wren v. Stokes*, (1902) 1 Ir. R. 167.

(f) *Wharton v. Naylor*, (1848) 12 Q. B. 673.

(g) As to the landlord's right in case of an execution, see Ch. XXII.

(h) Co. Litt. p. 47a; *Storey v. Robinson*, (1795) 6 T. R. 138; *Simpson v. Hartopp*, (1743) Willes, 512.

(i) *Nargatt v. Nias*, (1859) 28 L. J. Q. B. 143.

But now, by virtue of the Law of Distress Amendment Act, 1888 (subject to one proviso), the privilege is absolute to the value of 5*l*. What is actual use is a question of fact, subject to the limitation on the one hand and the other that it is not necessary to prove a manual use, nor sufficient to prove a mere custody and control. In *Field v. Adames* (a), an allegation that a horse and harness were in the actual possession of the plaintiff, and under his personal care and being used by him, was held sufficiently to allege privilege. In *Bunch v. Kennington* (b) nearly identical allegations with regard to a dog were held insufficient. In the old case of *Webb v. Bell* (c) a horse was seized while harnessed to a loaded cart, and the Court decided that it was a good distress. This case is doubted in *Simpson v. Hartopp* (d), but it is submitted that it is consistent with the other authorities, as it does not appear that any one was in charge of the horse, and therefore, though in use in one sense, it may not have been in use within the meaning of the rule.

(b.) Certain things are privileged on account of their nature; of these, animals *feræ naturæ*, things annexed to the freehold, things that cannot be restored in the same state, are privileged absolutely. Animals *feræ naturæ* are privileged because they are not strictly speaking the subject of property (e). Animals
feræ naturæ.

(c.) Things belonging to the freehold are not distrainable; under this head come, in the first place, those movable chattels which necessarily go with the land, such as keys, heirlooms, and title deeds (f). In the second place come fixtures, whether or not they are removable between heir and executor or landlord and tenant (g). That may be a fixture which is not actually attached to the soil, but simply left steadfast by its own weight, as, for example, a dry stone wall or statuary which is part of an architectural design, or "dog-grates" resting by their own weight (h). Chattels real.

Fixtures.

(a) (1840) 12 A. & E. 649.

(b) (1841) 1 Q. B. 679.

(c) (1669) 1 Sid. 440.

(d) (1743) Willes, 512. See also page of rept. 517.

(e) Co. Litt. 47a. It is stated in this passage that dogs cannot be distrained, but this appears not to be law at the present day. See *Bunch v. Kennington*, *supra*; Bac. Ab. Distress B. Deer, not

restrained in a private enclosure for sale or profit, are apparently *feræ naturæ* (*Threlkeld v. Smith*, (1901) 2 K. B. 531).

(f) See *per Cur.*, *Hellawall v. Eastwood*, (1851) 6 Ex. p. 311.

(g) *Darby v. Harris*, (1841) 1 Q. B. 895.

(h) *Monti v. Barnes*, (1901) 1 K. B. 205, C. A.

generally or for a particular occasion, and the granting of them is regulated by rules made under the Act. "If any person not holding a certificate under this section shall levy a distress contrary to the provision of this Act the person so levying and any person who authorised him so to levy shall be guilty of a trespass" (a). In *Hogarth v. Jennings* (b) the managing director of an incorporated company who in person distrained for rent due to the company, was held to have acted as a bailiff, and, as he was not authorised to do so by a certificate in accordance with the section, to have been guilty of a trespass.

The above provision of s. 7 of the Law of Distress (Amendment) Act, 1888, has been held to apply not only as between landlords and tenants, but also as between landlords and third parties whose goods are on the demised premises (c).

Crown and
foreign
envoys.

9. There can be no distress against the Crown (d), nor against foreign ambassadors and their servants (e).

Companies in
liquidation.

10. If a company under the Companies Act is in liquidation it cannot be distrained upon by its landlord for rent without the leave of the Court (f). But property of the company may be taken under a distress elsewhere than on its own premises for the rent of other people. Distress is only interfered with where there is the alternative remedy of proving in the liquidation (g).

Effect of
unlawful
entry.

Where the original entry of the distrainer is unlawful the whole of his subsequent proceedings are necessarily unlawful likewise, and he is liable for any goods which he may seize to the same extent as any other trespasser (h). However, a mere constructive seizure is not *per se* a cause of action. Where on any account such seizure is void, whether owing to the circumstances under which the entry was made or the character of the goods, the occupier is entitled to treat it as a nullity and his dominion over his property is nowise impaired (i). It would be

(a) *Perring & Co. v. Emerson*, L. T. Newspaper, Nov. 4th, 1905, p. 10.

(b) (1892) 1 Q. B. 907.

(c) *Perring & Co. v. Emerson*, (1905) 22 T. L. R. 14.

(d) *Secretary of State for War v. Wynne & Others*, L. T. Newspaper, Nov. 4th, 1905, p. 10.

(e) See Chitty on Prerogative, p. 376; 7 Ann. c. 12, s. 3. As to extent of privi-

lege, see *Norello v. Toogood*, (1823) 1 B. & C. 554.

(f) 25 & 26 Vict. c. 89, ss. 85, 87, 163.

(g) *Re Lundy Granite Co.*, (1871) L. R. 6 Ch. 462.

(h) *Attack v. Bramwell*, (1863) 3 B. & S. 520. As to what amounts to a seizure, see *Cramer v. Mott*, (1870) L. R. 5 Q. B. 357.

(i) *Beck v. Denbeigh*, (1860) 29 L. J.

different if there were an impounding, because thereby the owner is deprived of his goods, although they be not physically interfered with. He cannot deal with them, however unlawful the distress, without being liable for pound breach (a).

If a distrainer's entry is lawful but he is guilty of a trespass subsequently by seizing goods whether conditionally or absolutely privileged, he is only liable to the extent of that which is unlawfully seized, and the doctrine of trespass *ab initio* does not extend so far as to make the whole proceedings bad (b). If a distress is made where no rent at all is due the distrainer is liable for double damages (c).

Trespass
after entry.

An action for an irregular distress lies when any unlawful act or breach of duty is committed by the distrainer subsequently to the seizure. Formerly his liability in respect of such matters rested on the doctrine of trespass *ab initio*, by which a subsequent abuse of a right of entry given by the law made the original entry unlawful (d). However, by 11 Geo. II. c. 19, s. 19, where a distress is made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent, the distress shall not be deemed unlawful nor the distrainer a trespasser *ab initio*, but the party grieved may recover full satisfaction for the special damage sustained thereby, and no more, in a special action of trespass or on the case. By s. 20 of the Act the distrainer may tender amends, and if the amends are sufficient he is entitled to a verdict, such verdict carrying with it double costs against the distrainee (e).

Irregular
distress.

In the first place the distrainer is bound to return the goods seized on demand, if before impounding the rent actually due and the expenses of the distress are tendered to him (f). He is

Tender after
seizure.

Impounding.

C. P. 273; *Spice v. Webb*, (1838) 2 Jur. 943; and cp. *Swan v. Earl of Falmouth*, (1828) 8 B. & C. 456. It is otherwise if the seizure is merely excessive. See below, p. 314.

(a) See below, p. 317.

(b) *Harvey v. Pocock*, (1843) 11 M. & W. 740.

(c) 2 Will. & Mar. c. 5, s. 5; see *Masters v. Farris*, (1845) 1 C. B. 715. As to Costs, see *Avery v. Wood*, (1891) 3 Ch. 115, C. A.

(d) *Six Carpenters' case*, (1610) 8 Rep. 146a.

(e) 11 Geo. II. c. 19, s. 21.

(f) See above, p. 287; *Evans v. Elliot*, (1836) 5 A. & E. 142; *Long v. Warburton*, (1858) E. B. & E. 507. The expenses are now regulated by the rules made under 51 & 52 Vict. c. 21, s. 8, whereby two scales are provided, one where the rent demanded and due is over, the other where it is under, 20l.

also by the common law bound with reasonable speed to remove the goods taken from the premises to a pound (*a*). If he remains longer than is necessary, it is a trespass. The goods must be kept together and not taken to different pounds (*b*). The pound must be a fit and proper one for the safe reception and custody of the things distrained, or otherwise an action lies for any damage which they may sustain (*c*). When live stock are impounded, the distrainer is by statute bound to provide them with food and water, and has a power of sale to recover the expense of so doing (*d*).

Statutory
impounding.

In distresses for rent the common law method of impounding is practically superseded by 11 Geo. II. c. 19, s. 10, which empowers distrainers to impound or otherwise secure the distress on such part of the premises as shall be most fit and convenient.

Growing
crops.

Growing crops distrained under this statute (s. 8) must be harvested when ripe and stored on the premises if there is any proper place for so doing, and if not as near as may be, and notice of the place must be given (s. 9), and straw, hay and corn distrained under 2 Will. and Mar. c. 5, s. 3, must be impounded on the very spot where it is found.

Impounding
on premises.

It is difficult to define what is an impounding on the premises

(*a*) *Griffin v. Scott*, (1727) Lord Raym. 1424; *Peppercorn v. Hofman*, (1842) 9 M. & W. 618.

(*b*) 1 & 2 Phil. & Mar. c. 12, which Act provides also against driving to distant pounds, and imposes penal damages and a fine.

(*c*) *Vaspor v. Edwards*, (1701) 12 Mod. 658; *Bignell v. Clerk*, (1860) 5 H. & N. 485; *Wilder v. Speer*, (1838) 8 A. & E. 547.

(*d*) 12 & 13 Vict. c. 92, s. 5; 17 & 18 Vict. c. 60, s. 1; see *Layton v. Hurry*, (1846) 8 Q. B. 811. Before these statutes there was an important distinction between pounds overt and covert. A pound covert was a private pound to which the owner of the distress had no lawful access, and therefore the party impounding was bound to feed and water the cattle which he placed in such pound. A pound overt might be either public or private, but in case of such pound the

person impounding was not bound to supply food and water, since the owner might do so himself. The only difference between a public pound and a private pound overt was that in case of the former, the distrainer was not bound to give notice (see Gilbert on Distress, 4th ed. p. 61), because it was the natural place at which the owner would go to look for his beasts. "Be the pound common or not, it is the pound of him that uses it for that time, and the law does not require men to put the distress in the common pound but only that it be put in a pound overt, or be fed at the peril of the distrainer and taken care of by him; and common pounds are either by custom, tenure or agreement among the inhabitants of a vill or manor and not by common law." *Per* Holt, C.J., *Vaspor v. Edwards*, (1701) 12 Mod. p. 664. See, too, Co. Litt. p. 47b; Com. Dig. Distress D. 1.

within the meaning of 11 Geo. II. c. 19, s. 10. It would seem, however, that it is enough if either after or at the time of the seizure the distrainor gives the distrainee notice that he has impounded certain goods on the premises. It is not absolutely requisite that anyone should be left in possession. For although if a man quits possession after seizing and before impounding, that is an abandonment (*a*), yet after the impounding the custody of the law supersedes the physical custody (*b*).

The distrainor has no right to impound the goods so as to interfere more than is reasonably requisite with the possession of the occupier, and it would seem doubtful whether under any circumstances can the latter be altogether excluded from the premises (*c*). There is no obligation on the distrainor to impound on the premises (*d*).

The detention after impounding is not of itself a cause of action though the distress be unlawful, for the goods are in the custody of the law (*e*), but it may aggravate the damages if the impounding is illegal, just as imprisonment by the act of a magistrate may be considered as one of the consequences of a malicious prosecution. Consequently a pound-keeper who does nothing more than detain is not answerable under any circumstances to the party distrained on (*f*). So an impounding is not rendered unlawful by a subsequent tender of all that is due, whether the impounding be at common law or under 11 Geo. II.

Tender after
impounding.

(*a*) *Per* Holt, C.J., *Dod v. Monger*, (1704) 6 Mod. p. 216.

(*b*) *Jones v. Biernstein*, (1900) 1 Q. B. 100; *Swann v. Earl of Falmouth*, (1828) 8 B. & C. 456; *Thomas v. Harries*, (1840) 1 M. & G. 695. However, in *Washborn v. Black*, (1774) 11 East, 405, n., it was said that except by the assent of the tenant the goods ought to be removed to some definite part of the premises in order to constitute an impounding. See, too, *Tennant v. Field*, (1857) 8 E. & B. 336. Maule, J., who dissented in *Thomas v. Harries*, (1840) said that a notice could not make an impounding. It would seem, however, that the notice is important both as evidencing the intention to impound, and giving the distrainee the knowledge which he would otherwise acquire from the evidence of

his senses. He has a right to know whether his goods are impounded or not, for his whole legal position is affected thereby. In *Wood v. Nunn*, (1828) 5 Bing. 10, the landlord put his hand on a chattel, and said he would not suffer it to be removed till his rent was paid and it was held that the chattel was thereby in the custody of the law. But it seems doubtful whether these words were used strictly and whether the Court thought that it was impounded or merely seized.

(*c*) *Woods v. Durrant*, (1846) 16 M. & W. 149.

(*d*) *Per* Pollock, C.B., *Smith v. Ashforth*, (1860) 29 L. J. Ex. p. 260.

(*e*) Co Litt. 47b.

(*f*) *Badken v. Powell*, (1776) 2 Cowp. 476.

c. 19, s. 10 (a). It has been held, however, in a case of distress *damage feasant* that if a sufficient tender is made while the goods are in a private pound the tender is in time (b). It may be thought questionable how far this case is consistent with the other authorities. If impounding on the premises makes a tender too late it would seem that impounding off the premises is an *à fortiori* case. The ground given for the decision is that goods in a private pound are not in the custody of the law, which is much the same thing as saying that a private pound is no pound at all (c).

Tender
accepted.

If, however, the distrainer after impounding thinks proper to accept a tender, a refusal to give up the goods or any subsequent dealing with them is a conversion or a trespass (d).

Abuse
of thing
distrained.

The distrainer has only a right to keep the thing as it is when taken. If he otherwise deals with it, it is an abuse of the distress and a trespass (e). Formerly this rule was carried to very great length, and it was said to be a trespass to milk a distrained cow (f), and in one case it appears to have been held that a distrainer became a trespasser by cording a trunk for its better security (g). The better opinion, however, appears to be that it is lawful to do anything for the better preservation of the chattel which cannot possibly injure the owner. In *Duncomb v. Reeve* (h) the plaintiff alleged a trespass by tanning certain raw hides, and the defendants pleaded that they tanned them because otherwise they would have rotted, and it was held an ill plea "because thereby the property is *quasi* altered and the marks to know them again are taken from the owner so as he cannot have it again, and

(a) *Thomas v. Harries*, (1840) 1 M. & G. 695; *Ladd v. Thomas*, (1840) 12 A. & E. 117. In the former case, Maule, J., dissented, holding that while the goods were on the premises a tender was in time, and that the cases on common law impounding did not apply. Erle, J., expressed his approval of this view in *Tennant v. Field*, (1857) 8 E. & B. p. 344. As will be seen, a tender after impounding may make a subsequent sale unlawful. See below, p. 311.

(b) *Green v. Duckett*, (1879) 11 Q. B. D. 275.

(c) See above, p. 306, note (d), and

the authorities there referred to. An action lies for pound breach from a private pound. Fitz. N. B. p. 100.

(d) *West v. Nibbs*, (1847) 4 C. B. 172

(e) Under some circumstances it may amount to an abandonment of the distress. See below, p. 317; *Smith v. Wright*, (1861) 6 H. & N. 821.

(f) Vin. Ab. Distress, p. 8.

(g) *Per Twysden, J., Welsh v. Bell*, (1669) 1 Vent. p. 37.

(h) (1599) Cro. Eliz. 783. See, too, *Bagshaw v. Goward*, (1605) Cro. Jac. 147.

although one may in some cases meddle with and use a distress where it is for the owner's benefit, as where one distrains armour he may cause them to be scoured to avoid rust, so if one distrains raw cloth he may cause it to be fulled, for that is for the owner's benefit. But here this tanning is not for his benefit." However, considerations of this sort cannot well arise, since 11 Geo. II. c. 19, s. 19, has made some real damage necessary to a cause of action for any wrongful act subsequent to seizure. It is still however, a rule of law that perishable goods, such as the carcasses of recently-slaughtered animals, are privileged from distress—upon the ground that they are commodities which cannot be restored in the same plight and condition as that in which they were when taken (a).

In all cases of distress for rent there is by statute a power of sale. Power of sale.

By 2 Will. & Mar. c. 5, s. 2, "where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease or contract whatsoever, and the tenant or owner of the goods so distrained shall not within five days next after such distress taken and notice thereof, with the cause of such taking, left at the chief mansion-house or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security, to be given to the sheriff according to the law, then in such case after such distress and notice aforesaid, and the expiration of the said five days, the person distraining shall and may . . . cause the goods and chattels so distrained to be appraised by two appraisers, to appraise the same truly according to the best of their understanding; and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same towards satisfaction for the rent for which the said goods and chattels shall be distrained and the charges for such distress, appraisement and sale" (b). As already stated, however, the distrainer may not himself purchase the goods (c).

By 4 Geo. II. c. 28, s. 5, this remedy is extended to cases of distress for rent seck and rent charges.

(a) *Morley v. Pincombe*, (1848) 2 Ex. 101.

existing procedure in replevin, see above, p. 256.

(b) Certain omitted words are repealed by 35 & 36 Vict. c. 92, s. 13. For

(c) *Moore v. Singer Manufacturing Co.*, (1903) 2 K. B. 168.

It exists where goods are impounded on the premises under 11 Geo. II. c. 19, s. 10. However, by 51 & 52 Vict. c. 21, s. 5, no appraisement is now required, except where the tenant or owner of the goods by writing requires it to be made, and for the purposes of sale, the goods and chattels distrained shall, at the request in writing of the tenant or owner "be removed to a public auction-room or some other fit and proper place specified in such request and there be sold." The expenses of such appraisement and the expense and risk of such removal are to be borne by the party making the request. By the same Act (a) the time for holding the goods before sale is extended to a period not exceeding fifteen days, if the tenant or owner of the goods so requests in writing and gives security for any additional expense that may be caused. They may be sold at any time previously at the written request or with the written consent of the tenant or owner.

Distrainor
need not sell.

Exceptions.

The distrainor is not bound to exercise the power of sale given him by these provisions, the words "shall and may" being permissive only (b). However, corn, hay, straw, growing crops and cattle found depasturing on commons must, in all cases, be sold, since the method of dealing with them is directed by the very statutes making them distrainable (c).

If the option to sell is exercised all the conditions precedent laid down by the statute must be strictly fulfilled, otherwise the distress will become irregular. There must be, in the first place, a proper notice of the distress, with the cause of the taking. It must inform the tenant what goods are taken and what is the rent in arrear (d). A general notice of seizure of all the goods

(a) s. 6.

(b) *Lear v. Edmonds*, (1817) 1 B. & Ald. 157; *Hudd v. Ravenor*, (1821) 2 B. & B. 662; *Philpott v. Lehain*, (1877) 35 L. T. N. S. 855.

(c) 2 Will. & Mar. c. 5, s. 3; 11 Geo. II. c. 19, s. 8; *per* Parke, B., *Piggott v. Birtles*, (1836) 1 M. & W. p. 448.

(d) *Per Cur. Kerby v. Harding*, (1851) 6 Ex. p. 241. The statute allows a sale where goods are taken for "rent due." The rent due, therefore, must be the cause of the taking and must be truly stated. *Tancred v. Leyland*, (1851) 16

Q. B. 669), which shows that a distress need not be excessive merely because too much is claimed, is not inconsistent with this view, for there the giving of a wrong notice under the statute was not alleged. The absence or incorrectness of notice will not make the distress void or excessive, but it will make the sale irregular (*per Cur. Trent v. Hunt*), (1853) 9 Ex. p. 20). The date when the rent fell due need not, it seems, be given (*Moss v. Gallimore*, (1779) 1 Doug. 279).

on the premises is sufficient (a). But where the notice was of certain specified articles and everything else on the premises that might be required to satisfy the rent, it was held bad because it left it uncertain what goods were taken and what not (b).

The notice in ordinary cases must be "left at the chief mansion-house or other most notorious place on the premises," and therefore it must be in writing, because a verbal notice cannot be left (c). Where, however, the goods of a stranger are distrained, notice may be given to him instead of to the tenant, and in such a case the words above quoted do not apply (d). How served.

The sale, except by written consent, must not take place until after the whole statutory period has elapsed. Thus, in the ordinary case under the principal Act, there must be five days, not counting the day on which notice is given (e), and on the sixth day, the sale is lawful, unless meantime the goods have been replevied or a tender of the rent and expenses has been made, in which case the sale is irregular (f). After this time it is too late to tender, but so long as the goods remain unsold the property in them is not altered, and they may be replevied (g).

By the express terms of 11 Geo. II. c. 19, ss. 8, 9, growing crops are not to be sold until they are ripe and gathered, and up to that time a tender may be made. Time of sale of crops.

Where appraisement is necessary it must be made by independent persons, and therefore neither the distrainor nor his agent in the distress are fit for the purpose (h). It is not necessary that the appraisers employed should be professional, but they must be reasonably competent persons (i). Appraise-ment.

If the goods are impounded on the premises under 11 Geo. II. c. 19, s. 10, by the terms of the section a reasonable time after the appointed interval is allowed for the conduct of the sale Sale on premises.
Time allowed.

(a) *Wakeman v. Lindsey*, (1849) 14 Q. B. 625.

(b) *Kerby v. Harding*, (1851) 6 Ex. 234.

(c) *Wilson v. Nightingale*, (1846) 8 Q. B. 1034.

(d) *Walter v. Rumbal*, (1695) Lord Raym. 53.

(e) *Robinson v. Waddington*, (1849) 13 Q. B. 753.

(f) *Johnson v. Upham*, (1859) 2 E. & E. 250; overruling *Ellis v. Taylor*, (1841) 8 M. & W. 415.

(g) *Jacob v. King*, (1814) 5 Taunt. 451.

(h) *Per Best, C.J., Lyon v. Weldon*, (1824) 2 Bing. p. 336.

(i) *Roden v. Eyton*, (1848) 6 C. B. 427.

and the removal of the goods, but if such time is exceeded the unnecessary interference with the possession of the tenant is a trespass (a).

Sale under
value.

The goods must be sold at the best price, therefore the distrainer is answerable for the proper and reasonable conduct of the sale (b). If he has distrained growing crops, which by the terms of the tenancy are to be consumed on the premises, he must sell at market and not at consuming price (c). He is not bound to postpone the sale of goods conditionally privileged until he has seen whether he can realise sufficient without them (d). Being the seller of the goods he cannot likewise be the buyer, and if he endeavours to take them at a valuation the transaction is a nullity (e).

Overplus.

It was formerly the duty of the distrainer, if there was any overplus at the sale, to leave it in the hands of the sheriff, under-sheriff or constable who aided and assisted in the distress, and if this was not done an action lay for the breach of duty (f). By 35 & 36 Vict. c. 92, s. 13, the aid and assistance of such officers is not required, but no provision is made for the overplus. It is to be presumed that the owner of the goods can sue for it in an action for money had and received (g).

Waiving
irregularity.

It is to be observed that throughout all the proceedings in a distress the maxim "*Volenti non fit injuria*" applies. A man cannot recover in trespass for any act done with his leave and licence nor for any other irregularity which has been committed with his assent (h).

Special
damage.

In an action for an irregular distress the plaintiff can only recover satisfaction for the special damage occasioned by the irregularity, and if there is no damage there is no cause of

(a) *Pitt v. Shew*, (1821) 4 B. & Ald. 206; *Winterbourne v. Morgan*, (1809) 11 East, 395.

(b) See *Poynter v. Buckley*, (1833) 5 C. & P. 512.

(c) *Ridgway v. Lord Stafford*, (1851) 6 Ex. 404; *Hawkins v. Walrond*, (1876) 1 C. P. D. 280.

(d) *Jenner v. Yolland*, (1818) 6 Price, 3.

(e) *King v. England*, (1864) 4 B. & S. 782; *Moore v. Singer Manufacturing*

Co., (1903) 2 K. B. 168.

(f) 2 Will. & Mar. c. 5, s. 2.

(g) See on this point *Erans v. Wright*, (1857) 2 H. & N. 527.

(h) *Washborn v. Black*, (1774) 11 East, 405, n.; *Tennant v. Field*, (1857) 8 E. & B. 336; *Bishop v. Bryant*, (1834) 6 C. & P. 484. The proviso, however, in 51 & 52 Vict. c. 21, s. 6, which speaks of a written consent, would seem in the case provided for to exclude a mere verbal assent.

action (a). It would seem, however, that where the injury alleged is a pure trespass, as for example an unreasonable disturbance of the plaintiff's possession of the premises, it is not intended that he shall be put to prove some definite pecuniary loss. The Act contemplates that trespass may be brought in fitting cases for an irregularity (b).

Where the action is brought for an irregular sale it is enough to prove that the conditions prescribed by the Act were in some respect broken and that the goods realised less than their value, but it is not necessary to prove that the damage was the direct consequence of the breach of duty. If, for instance, goods are not appraised, the failure to appraise may not cause them to be sold less favourably, but it will make the sale irregular, and if such sale is at an undervalue it is the cause of the loss (c). The general rule is that in such a case the party is entitled to recover the true value of the goods, less the proper expenses of the sale and the rent actually satisfied (d).

Damage for
irregular sale.

If the owner of the goods is not the person who is liable for the rent it is obvious that the measure of damages in an irregular distress may be different, for the satisfaction of the rent is no benefit to him and therefore cannot be taken into consideration as a diminution of damage. In *Sharpe v. Fowle* (e), the plaintiff was a lodger. The defendant, the superior landlord, distrained and sold within the five days, and the plaintiff recovered the whole value of his goods. The ground of the decision was that the premature action of the landlord interfered with the lodger's right of serving a declaration under the Lodgers' Goods Protection Act, 1871. This consideration would not apply to a complete stranger, and if his goods were sold within the five days it is apprehended that he could not recover unless he showed that he had suffered actual damage from the landlord's irregularity.

Damages
where goods
belong to
stranger.

However irregular a sale may be it is not a mere nullity, and will avail to pass the property. Therefore the tenant or owner of the goods cannot follow them into the hands of third parties

Effect of
irregular sale
on property.

(a) 11 Geo. II. c. 19, s. 19; *Rodgers v. Parker*, (1856) 18 C. B. 112.

(1832) 5 C. & P. p. 323. See, too, *Sharpe v. Fowle*, (1884) 12 Q. B. D. 385.

(b) *Brown v. Sherill*, (1834) 2 A. & E. 138.

(d) *Biggins v. Goode*, (1832) 2 C. & J. 364; *Knotts v. Curtis*, *supra*.

(c) *Per Parke, B., Knotts v. Curtis*,

(e) (1884) 12 Q. B. D. 385.

or recover of the distrainer in trover (*a*). It was indeed held in *Owen v. Legh* (*b*) that a mere sale of growing crops unaccompanied by any dealing with them was a mere nullity and afforded no ground of action, but this decision seems inconsistent with the subsequent cases. Where, however, the landlord took the goods distrained at a valuation, it was held that, there being no sale at all, no property passed (*c*).

Broker's
charges.

By 57 Geo. III. c. 93, s. 6, every broker or person levying a distress is bound to give a copy of the charges to the person whose goods are distrained, but this does not affect the person who causes the distress to be levied, nor does it make the distress irregular (*d*). Where, however, a bailiff in distraining has retained, out of the amount realised, an unreasonable charge for costs in connection with the distress, the remedy of the distrainee is not confined to the statutory application prescribed under s. 2 of the Distress (Costs) Act, 1817. The County Court having jurisdiction to try an action in which repayment is claimed of so much of the charge as is unreasonable (*e*).

Excessive
distress.

An excessive distress is a breach of the duty imposed by 52 Henry III. c. 4 (which is declaratory of the common law), enacting that distresses shall be reasonable and not too great.

Excessive
claim.

Merely to distrain under an excessive claim is not necessarily an excessive distress. An action nevertheless lies if the party distrained on is thereby put under a difficulty in his replevin (*f*).

Excessive
seizure.

The ordinary kind of excessive distress, however, consists in the seizure of an amount of goods which is altogether out of proportion with the debt really to be satisfied. It will be, of course, an aggravation of the damage if there be subsequently an excessive sale. A mere constructive seizure will suffice to give a cause of action, because not being wholly unlawful or a trespass (*g*) the tenant cannot treat it as a nullity, and his dominion is thereby

(*a*) *Wallace v. King*, (1788) 1 H. Bl. 13; *Lyon v. Weldon*, (1824) 2 Bing. 334; *Rodgers v. Parker*, (1856) 18 C. B. 112.

(*b*) (1820) 3 B. & Ald. 470.

(*c*) *King v. England*, (1864) 4 B. & S. 782.

(*d*) *Hart v. Leach*, (1836) 1 M. & W. 560. As to amount of charges, see

Distress for Rent Rules, and *Headland v. Custer*, (1905) 1 K. B. 219, C. A.

(*e*) *Rex v. Philbrick & Morey, Ex parte Edwards*, (1905) 2 K. B. 108.

(*f*) *Tancred v. Leyland*, (1851) 16 Q. B. 669. See above, p. 310, note (*d*).

(*g*) *Hutchins v. Chambers*, (1758) 1 Burr. 579.

impaired (a), and it makes no difference that he has, in fact, enjoyed a permissive use of the property (b).

A distrainer is not guilty of an excessive distress merely by slightly exceeding the amount requisite. "He is not bound to calculate very nicely the value of the property seized, but he must take care that some proportion is kept between that and the sum for which he is entitled to take it" (c). Thus in the time of Edward III. (1327—77) distresses of forty sheep for 2*d.*, and sixteen oxen for 9*d.* were held excessive (d). In *Roden v. Eyton* (e), the property taken exceeded the amount due by 50 per cent., and it was held not excessive. If there is but one thing to be distrained it may be taken, however excessive its value, since otherwise the distress would be altogether defeated (f). It seems to have been at one time thought that no action could lie for an excessive distress if the goods fairly sold did not realise the amount of the rent (g), their value in the sale being their value to the distrainer; but it has been held that the party distrained on is not thereby absolutely concluded. "You cannot make the sale under the distress a test of value; if so, probably no distress could be deemed excessive" (h).

If the distrainer goes on selling after he has realised sufficient it is conceived that this would be a trespass and not merely an excess (i).

Things distrainable only by statute are within the protection of 52 Henry III. c. 4, just as much as things distrainable by the common law (k).

Excess when things distrainable by statute.

If chattels are taken under an excessive distress an action may be maintained by anyone who has such an interest in them as

Interest in goods to support action.

(a) *Chandler v. Doulton*, (1865) 3 H. & C. 553. It is otherwise where the seizure would be a trespass. See above, p. 305.

(b) *Bayliss v. Fisher*, (1830) 7 Bing. 153.

(c) *Per Bayley, J., Willoughby v. Backhouse*, (1824) 2 B. & C. p. 823.

(d) Ro. Abr. 674.

(e) (1848) 6 C. B. 427.

(f) 2 Inst. p. 107; *Arenell v. Croker*, (1828) M. & M. 172; *Field v. Mitchell*, (1807) 6 Esp. 71.

(g) *Wells v. Moody*, (1835) 7 C. & P. 59.

(h) *Per Martin, B., Smith v. Ashforth*, (1860) 29 L.J. Ex. p. 260. The decision as to whether a particular distress is excessive or not, being one of fact, is apparently for the jury (*Smith v. Ashforth, supra*).

(i) This is so in the case of an execution (*Gawler v. Chaplin*, (1848) 2 Ex. 503).

(k) *Piggott v. Birtles*, (1836) 1 M. & W. 441.

would support an action of trover (*a*). If, in an excessive distress the goods of the tenant and a stranger are taken together, the latter has a right of action (*b*).

It has, however, been held (in an action for damages for illegal and excessive seizure of distress for rates), that the wrongful act of an assistant overseer does not relate back to the overseers, on whose behalf he purported to act, so as to render them liable for his tort (*c*).

Interference
with distress.

It remains to point out the remedies which the law gives where the right of distress is improperly interfered with.

Fraudulent
removal.

The rights of landlords to follow goods in case of fraudulent removal have already been dealt with. An action of debt also lies for double the value of the goods against all who are parties to such fraudulent removal with knowledge of the fraud (*d*).

Preventing
distress.

If a person coming to make a distress is impeded and obstructed so that he is thereby prevented from seizing, the intending distrainer has a right of action for the damage thereby caused (*e*).

Rescue and
pound breach.

If after goods are seized and before impounding they are wrongfully taken out of the bailiff's possession, the distrainer may bring an action of rescue, but if they are taken out of the pound the form of action is pound breach. These remedies existed at common law in favour of any party distraining. By statute (*f*) upon any pound breach or *rescous* of goods or chattels distrained for rent the persons grieved thereby have a right of action for treble damages and treble costs (*g*) without proof of any special damage being suffered by them (*h*), not only against the parties proved to have been concerned in the act, but also against the owners of the goods distrained in case they are proved to have subsequently come into their possession. A rescue may either be in deed by an actual taking, or in law as where cattle on their way to the pound escape and come into the hands of their owner. If he refuse to deliver them, this is a rescue in law (*i*). If the

(*a*) *Fell v. Whittaker*, (1871) L. R. B. & C. 537.
7 Q. B. 120.

(*b*) *Fisher v. Algar*, (1826) 2 C. & P. 374.

(*c*) *Baker and Wife v. Wicks and others*, (1904) 1 K. B. 743.

(*d*) See above, pp. 291-2. 11 Geo. II. c. 19. See *Brooke v. Noakes*, (1828) 8

(*e*) Fitz. N. B. p. 102.

(*f*) 2 Will. & Mar. c. 5, s. 4.

(*g*) *Lawson v. Story*, (1694) 1 Lord Raym. 19.

(*h*) *Kemp v. Christmas*, (1898) 79 L. T. 233.

(*i*) Co. Litt. p. 161a.

seizure on any ground is illegal the owner may lawfully rescue his goods. He has the same right of recaption as against any other trespasser (a). If between seizure and impounding the party making the distress voluntarily quits actual possession this is an abandonment. The owner is restored to his full dominion, and anything which he may do with the goods is no rescue (b). When rescue lawful.

When the impounding is once complete the goods are in the custody of the law, and whether the original taking was lawful or not it is a pound breach to remove them from the pound (c). It is difficult, however, assuming that the distress be illegal, to see what the damage can be, and no action lies under the statute because there is no party grieved (d). If, however, a pound be left open the owner of goods improperly distrained may, it seems, come and retake them, for there is no real impounding (e). After abandonment there can be no pound breach because the distress is thereby determined. It has been already pointed out that in impounding a continuance of possession is not necessary, but if a man is left in possession his subsequent withdrawal may be evidence of an intention to abandon (f). Lawful retaking after impounding.

If a distrainer abuses the distress when impounded the owner may be entitled to interfere and resume possession for the protection of his property. It is not, however, for every abuse that he is allowed to take this course. The mere fact of a distrainer making himself a trespasser *ab initio* at common law only puts him in the same position as though the original taking were illegal; and, as has been seen, the illegality of the distress does not justify the breaking of the pound. It would seem that to justify a retaking the abuse of the distress must be so great as to amount to an abandonment or forfeiture of the distrainer's right, thereby putting an end to the impounding (g). Where distress abused.

(a) Co. Litt. p. 47b, p. 160b.

(b) *Per* Holt, C.J., *Dod v. Monger*, (1704) 6 Mod. p. 216; *Knowles v. Blake*, (1829) 5 Bing. 499; Com. Dig. Distress D. 1.

(c) Co. Litt. p. 47b; *Parret Navigation Co. v. Strouger*, (1840) 6 M. & W. 564.

(d) *Berry v. Huckstable*, (1850) 14

Jur. 718.

(e) Co. Litt. p. 47b.

(f) See above, p. 294. *Swann v. Earl of Falmouth*, (1828) 8 B. & C. 456; cp. *Bannister v. Hyde*, (1860) 2 E. & E. 627; see, too, *Kerby v. Harding*, (1851) 6 Ex. 234.

(g) *Smith v. Wright*, (1861) 6 H. & N.

821.

Where no
notice of
impounding.

It might possibly happen that goods impounded on the premises might be removed by a purchaser from the distrainee without any notice of the impounding. It is submitted that in such a case the innocent purchaser might not be liable under the statute which gives treble damages against the "offender" (a).

Property of
distrainor.

When the goods are in the pound the distrainor has no possession or right of possession, since they are in the custody of the law. The consequence is that in case of pound breach his remedy is confined to the immediate wrong-doers. He cannot sue in trover any third person into whose hands the goods subsequently came. The case might be supposed to be different where a rescue takes place before impounding, for then the distrainor has an actual possession, coupled—in case of distress for rent—with a power of sale, which might seem a sufficient special property to enable him to follow the goods. Authority, however, is against this view, and the distrainor must be considered as standing on a peculiar footing, and not enjoying the rights ordinarily incident to possession (b).

If, however, goods distrained are rescued or taken out of the pound, the distrainor has a right of recaption on a fresh pursuit (c). As is elsewhere pointed out, this right confers a licence in law to go on the land to which the goods have been removed, but not to enter forcibly (d).

Distress
damage
feasant.

If a man find the chattel of another unlawfully on his land and doing damage, he may seize and detain it impounded, in order to compel the owner of the offending chattel to make compensation for the damage done. This right is known as distress *damage feasant*. The manner of the exercise of this right is regulated by the same rules of the common law as in the case of distress for rent, subject to the modifications hereafter pointed out. With regard to the statute law, 2 Will. & Mar. c. 5, and 11 Geo. II.

(a) But a man may be an innocent "offender" against the Copyright Acts. See Ch. XXI.

(b) See 2 Wm. Saund. p. 47b *in not.*; *Rex v. Cotton*, (1751) Parker, 112; *Turner v. Ford*, (1846) 15 M. & W. 212. *Per* Blackburn, J., *King v. England*, (1864) 4 B. & S. p. 785. It was said, however, in *Symons v. Hearson*, (1823) 12 Price, p. 386, that a distrainor might

bring trespass in respect of his actual possession if goods were rescued.

(c) *Rich v. Woolley*, (1831) 7 Bing. 651; see, too, *Wood v. Nunn*, (1828) 5 Bing. 10. As to additional rights when accompanied by a constable, see 11 Geo. II. c. 19, s. 7.

(d) *Patrick v. Colerick*, (1838) 3 M. & W. 483. See below, pp. 345-6.

c. 19, have no application to distress *damage feasant*. In this kind of distress, therefore, there is no power of sale, and the doctrine of trespass *ab initio* fully applies.

Distress *damage feasant* is usually taken of straying cattle, but it may be equally well taken of any other chattel which unlawfully encumbers and damages a man's land (a). There is no privilege from distress *damage feasant*, "it being but natural justice that whatever doth the injury should be a pledge to make compensation for it" (b). A single exception exists in the case of things in actual use. This is for the sake of avoiding breaches of the peace (c), although it has been said, but apparently without sufficient authority, that a horse may be led to the pound with the rider on him (d). The well-known case of Mr. Pickwick in the wheelbarrow may perhaps be cited in support of the same doctrine.

What may be
distrained.

The distress being a remedy for trespass, the right can, as a rule, be exercised only by a person who has a sufficient possession of land to entitle him to maintain an action of trespass (e). A commoner, however, may distrain beasts which are grazing on his common without any colour of right, but not where there is merely a case of surcharging (f). But a power of distraint accrues, to the person in possession, when tenants in common by mutual agreement severally exercise, during a specific period, complete dominion over the whole of the land (g).

Who may
distrain.

Where there is no trespass there is no right of distress. Thus, if cattle on being driven along a road stray on to the unfenced land adjoining, without default on the part of their drivers, they cannot be distrained until there has been a reasonable opportunity of driving them back again (h): and on the other hand, if cattle

No trespass,
no distress.

(a) *Ambergate, &c., R. Co. v. Midland R. Co.*, (1853) 2 E. & B. 793.

(b) Gilbert on Distress, 4th ed., p. 49.

(c) *Storey v. Robinson*, (1795) 6 T. R. 138; *Field v. Adames*, (1840) 12 A. & E. 649.

(d) Gilbert on Distress, 4th ed., p. 49.

(e) *Burt v. Moore*, (1793) 5 T. R. 329; *Churchill v. Evans*, (1809) 1 Taunt. 529.

(f) Anon., (1770) 3 Wils. 126; *Hall v. Harding*, (1768) 4 Burr. 2426; *Cape v. Scott*, (1874) L. R. 9 Q. B. 266. See

Kentick v. Pargiter, (1608) Cro. Jac. 208.

(g) *Whiteman v. King*, (1791) 2 H. Bl. 4.

(h) *Goodwyn v. Chereley*, (1859) 4 H. & N. 631. It was held in this case that the reasonableness of the time must be estimated with regard to all the circumstances, and that if part of a drove strayed, the drover was not bound at once to go after them, but might first take proper precautions for the safety of the rest.

are not lawfully on the road they may be distrained directly they stray from it to the adjoining land (a). In *Singleton v. Williamson* (b), the defendant owned a close adjoining a close of the plaintiff's, and was under a liability to repair the fence between the two closes. The fence being insufficient, the plaintiff's cattle strayed through it, and ultimately broke through another fence into a third field also belonging to the defendant. He there distrained them, and it was held that the distress was unlawful, inasmuch as the damage of which he complained was the natural consequence of his own breach of duty.

Actual
damage.

Distress must
be at time of
trespass.

To justify the distress there must not only be a trespass but also actual damage, as where cattle tread down and devour grass or corn (c). If an animal strays into a paved yard the mere fact of its presence does not make it distrainable (d). The distress can only be made during the continuance of the trespass. And the distrainer must be actually in the *locus in quo* (e) as the animal cannot be followed off the land; it must be seized then and there (f), and it would seem that even if it is still on the land it is not distrainable unless actually doing damage or likely to do damage (g). Accordingly if an animal trespasses on two occasions and on the second is taken for a trespass, the impounding can only be to answer for the damage done at the time, and not for that done previously (h).

Chattel only
distrainable
for its own
damage.

If a herd of cattle trespass, each is only distrainable for its own damage; the injured party cannot detain one in respect of the mischief which the whole herd have done (i). It follows that there can be no such thing as an excessive distress *damage feasant*, inasmuch as there is no choice as to what shall be distrained.

For what
damage
animals are
distrainable.

In a modern case (k) it was held that the damage for which

(a) *Doraston v. Payne*, (1795) 2 H. Bl. 527.

(b) (1861) 7 H. & N. 410.

(c) Gilbert on Distress, 4th ed., p. 24.

(d) *Wormer v. Biggs*, (1845) 2 C. & K. 31.

(e) *Clement v. Milner*, (1800) 3 Esp. 95.

(f) *Per Holt, C.J., Vaspor v. Edwards*, (1701) 12 Mod. p. 661; Co. Litt. p. 161a. It was held by Lord Eldon (*Clement v. Milner*, (1800) 3 Esp. 95)

that if a man came into a field before the trespassing cattle got out of it he might follow them; but according to all the other authorities there is in this kind of distress no such right of taking on a fresh pursuit.

(g) *Wormer v. Biggs*, *supra*.

(h) *Per Holt, C.J., Vaspor v. Edwards*, (1701) 12 Mod. 658, *supra* Gilbert on Distress, 4th ed., p. 22.

(i) *Ibid*.

(k) *Boden v. Roscoe*, (1894) 1 Q. B. 60.

trespassing animals may be distrained is not confined to damage to the freehold, but includes damage of all kinds. There a pony of the defendant escaped into the plaintiff's field and kicked a filly of the plaintiff. It was held that the pony might be detained until tender of amends for the injury to the filly. This decision seems to be unsupported by earlier authority, and to be opposed to the received opinion in the text-books on distress (*a*), which is to the effect that the damage must be to *the land or its produce*, under which latter term would of course be included wild rabbits in a warren (*b*). The remedy is one given only to landowners, and presumably must be for a damage which they suffer in that character. But an injury to a chattel, even if done on the plaintiff's land, is not done to him as a landowner.

A distress *damage feasant* may be taken in the night-time, for otherwise the remedy might be lost altogether (*c*). May be taken in the night.

If goods are exposed for sale in any public fair or market the lord of the franchise may distrain upon them for the amount of toll lawfully payable (*d*). He cannot seize goods sold in fraud of the market outside of its limits, but is left to his remedy by action (*e*). Distress for market dues.

The term distress is applied to the process by which a court of summary jurisdiction enforces satisfaction of costs and penalties imposed by its authority. It is rather a special kind of execution than a distress properly so called. The procedure is regulated by 42 & 43 Vict. c. 49, ss. 21 & 43. Distress by court of summary jurisdiction.

The procedure for enforcement of payment of taxes is also, though called a distress, an execution. It is regulated by 43 & 44 Vict. c. 19, s. 86. For taxes.

Rates of various kinds (*f*) are levied by distress under warrant of justices (*g*), the process being virtually an execution (*h*). For rates.

(*a*) Bullen on Distress, 2nd ed., p. 257 ; Gilbert on Distress, 4th ed., p. 21.

(*b*) Rolle, Abr. tit. Distress, p. 664.

(*c*) Co. Litt. p. 142a.

(*d*) Gilbert on Distress, 4th ed., p. 18.

(*e*) *Blakey v. Dinsdale*, (1777) 2 Cowp. 661 ; *Bridgland v. Shapter*, (1839) 5 M. & W. 375.

(*f*) For poor rate, see 43 Eliz. c. 2, s. 2 ; 17 Geo. II. c. 38, ss. 7, 8 ; for highway rates, 5 & 6 Will. IV. c. 50, ss. 34, 104 ; for rates under the Public Health Act. 38 & 39 Vict. c. 55, s. 256. It is to

be observed that in respect to poor and highway rates the doctrine of trespass *ab initio* is abolished by the statutes referred to. There was a corresponding provision in the previous Public Health Act (11 & 12 Vict. c. 63, s. 131), which does not seem to have been re-enacted in 38 & 39 Vict. c. 55.

(*g*) 12 & 13 Vict. c. 14. See Ch. XXII.

(*h*) *Hutchins v. Chambers*, (1758) 1 Burr. 579.

In distress for rates it is within the jurisdiction of justices; when a ratepayer, though refusing to pay the whole of a legally made rate, tenders a portion thereof: to order the distress to issue only for that portion of the rate which was not actually tendered by him (a). The exercise of this power is, however, purely discretionary (b).

In cases where a bailiff distraining for rates illegally retains, from the results of the sale, an unreasonable charge for taking, keeping, and selling the distress, the remedies of the distrainee are twofold.

(1.) The statutory remedy prescribed by s. 2 of the Distress (Costs) Act, 1817; or

(2.) By action against the bailiff in the County Court for the return of so much of the charge as is unreasonable (c).

(a) *Rex v. Gillespie*, (1904) 1 K. B. 174; 68 J. P. 11; 20 T. L. R. 113.

(b) *Wiles, Ex parte*, (1904) 90 L. T. 225.

(c) *Rex v. Philbrick & Morey*;

Edwards, Ex parte, (1905) 2 K. B. 108. As to the scale of charges when the debt does not exceed 20l., see *Hradland v. Custer*, (1905) 1 K. B. 219.

Canadian Notes to Chapter XII.

DISTRESS.

SOME STATUTORY PROVISIONS RELATING TO DISTRESS PROPER.

The following do not include the statutes as to limitation of actions in respect to Real Property which are collected in the notes to the next chapter, nor the provisions relating to distress for taxes and to judicial executions designated as warrants of distress which are mentioned below in the notes (a) to this chapter.

Canada.

Criminal Code, R. S. C. 1906, c. 146, s. 296, includes, under the head of "aggravated assault," an assault on any person in making any lawful distress or seizure or with intent to rescue any goods so taken; s. 1045, costs in case of libel leviable by distress; s. 1046, costs on conviction for assault leviable by distress.

Ontario.

R. S. O. 1897, c. 60 (Division Courts); ss. 276—282, claims of landlords in respect to goods seized.

(a) Canadian notes to p. 321.

R. S. O. 1897, c. 66 (Replevin), s. 2, replevin of goods Ontario wrongfully distrained.

R. S. O. 1897, c. 75 (Costs of Distress or Seizure of Chattels).

R. S. O. 1897, c. 77 (Execution), s. 2, exemptions; sub-s. 1, bedding (ordinary); sub-s. 2, apparel (ordinary); sub-s. 3, furniture (as enumerated); sub-s. 4, fuel and provisions (for thirty days); sub-s. 5, domestic animals (as enumerated); sub-s. 6, tools (up to \$100; see amendment, 62 Vict. c. 7, s. 1); sub-s. 7, bees (fifteen hives).

The above section is made applicable to cases of landlord and tenant by s. 30 of the Landlord and Tenant's Act (c. 170), *infra*.

R. S. O. 1897, c. 121 (Mortgages of Real Estate), s. 15, right of mortgagee to distrain limited to goods of mortgagor not exempt from seizure under execution; s. 16, right of mortgagee to distrain limited to one year's interest or rent.

R. S. O. 1897, c. 126 (Short Forms of Mortgages), 2nd Schedule, clause 15 (distress clause) (a).

R. S. O. 1897, c. 129 (Trustees and Executors), ss. 13, 14, distress by executors of lessor.

R. S. O. 1897, c. 170 (Landlord and Tenant's Act), s. 30, exemptions under execution made applicable in certain cases; s. 31, goods on premises not property of tenant exempt with certain exceptions; s. 32, tenant claiming exemption must vacate; form of notice to tenant; s. 33, right of set-off against rent; s. 34, lien of landlord for one year's arrears as against assignee for benefit of creditors; ss. 36, 37, sale of growing crops: ss. 39—42, protection of goods of boarders and lodgers.

R. S. O. 1897 (Vol. III.), c. 322 (Rights and Liberties of the People), s. 3, illegal distresses (52 Hen. III. c. 1, Statute of Marlbridge).

R. S. O. 1897 (Vol. III.), c. 342 (Landlord and Tenant No. 2) (b), s. 1, distress for rent seck (4 Geo. II. c. 28, s. 5); s. 2, distress for arrears on lease determined (8 Anne, c. 18, ss. 6, 7) (b); s. 3,

(a) For the decisions on distress clauses, see *La Vassure v. Heron*, 45 U. C. R. 7, abandonment of first seizure; *Laing v. Ontario Loan and Savings Co.*, 46 U. C. R. 114, effect of clause without attornment; *McBride v. Hamilton Provident and Loan Society*, 29 O. R. 161, goods of stranger; *Royal Canadian Bank v. Kelly*, 19 U. C. C. P. 196, 430; 20 U. C. C. P. 519; 22 U. C. C. P. 279; *Hurron v. Yeman*, 3 O. R. 126, distress by purchaser under power; *Trust and Loan Co. v. Lawrason*, 6 A. R. 286; 10 S. C. R. 679, distinguished in *Pegg v. Independent Order of Foresters*, 1 O. L. R. 97; *Educards v. Hamilton Provident and Loan Society*, 19 O. R. 677; 18 A. R. 347, damages; *Munro v. Commercial Build-*

ing and Investment Society, 36 U. C. R. 464; *McKay v. Howard*, 6 O. R. 135, conflicting clauses in deed; *McDonell v. Building and Loan Association*, 10 O. R. 580, demise clause; *Ontario Loan and Debenture Co. v. Hobbs*, 16 A. R. 255, creation of relation of landlord and tenant; *Klinck v. Ontario Industrial Loan and Investment Co.*, 16 O. R. 562, effect of maturity of mortgage on tenancy and right of distress.

(b) Distress more than six months after expiration of tenancy is illegal: *Soper v. Brown*, 4 O. S. 103. Cf. *Strathey v. Crooks*, 6 O. S. 587; *McClenaghan v. Barker*, 1 U. C. R. 26; *Hartley v. Jarris*, 7 U. C. R. 545, landlord cannot distrain after his interest in

Ontario.

distress by husband in right of deceased wife (32 Hen. VIII. c. 37, s. 3); s. 4, distress after death of *cestui que vie* (32 Hen. VIII. c. 37, s. 4); s. 5, distress is to be reasonable (52 Hen. III. c. 4, Statute of Marlbridge); s. 6, distress of sheaves, loose hay, &c. (2 W. & M. sess. 1, c. 5, s. 2); s. 7, distress of cattle on appurtenant ways, &c., and of growing crops (11 Geo. II. c. 19, s. 8); s. 8, tenants to have notice, distress satisfied by payment (11 Geo. II. c. 19, s. 9); s. 9, certain animals (not damage feasant) not to be distrained if other sufficient distress (Statute of Exchequer); s. 10, no distress of chattels off premises (52 Hen. III. c. 15, Statute of Marlbridge); s. 11, distress of goods fraudulently carried off premises (11 Geo. II. c. 19, s. 1); sub-s. 2, but not *bonâ fide* sold (11 Geo. II. c. 19, s. 2); s. 12, breaking open houses to seize such goods (11 Geo. II. c. 19, s. 7); s. 13, penalty of fraudulent removal and procedure (11 Geo. II. c. 19, ss. 3—6); s. 14, beasts distrained not to be driven out of municipality (3 Edw. I. c. 16; 1 P. & M. c. 12, s. 1); sub-s. 2, distrained property not to be impounded in different places (1 P. & M. c. 12, s. 1); sub-s. 3, distress impounded on demised premises (11 Geo. II. c. 19, s. 10); s. 15, pound breach or rescue (2 W. & M. sess. 1, c. 5, s. 3); s. 16, sale of distress (2 W. & M. sess. 1, c. 5, s. 1; 2 Edw. VII. c. 1, s. 22); s. 17, irregularities not to make distress void *ab initio* (11 Geo. II. c. 19, s. 19); sub-s. 2, tender of amends (11 Geo. II. c. 19, s. 20); s. 18, liability for wrongful distress (52 Hen. III. c. 4; 3 Edw. I. c. 16); sub-s. 2, where no rent due double value (2 W. & M. sess. 1, c. 5, s. 4) (a); s. 19, goods taken in execution not to be removed till rent paid (8 Anne, c. 18, s. 1); ss. 20, 21, over-holding tenants double liability (4 Geo. II. c. 28, s. 1; 11 Geo. II. c. 19, s. 18).

Alberta and
Saskatche-
wan.

C. O. N. W. T. 1898, c. 34 (respecting Distress for Rent and Extra-judicial Seizure).

British
Columbia.

R. S. B. C. 1897, c. 52 (County Courts), s. 188, landlord's preference to county court execution.

R. S. B. C. 1897, c. 61 (Distrainment Procedure Act).

R. S. B. C. 1897, c. 110 (Landlord and Tenant Act), s. 2, limitation on landlord's right to distrain on goods sold conditionally to tenant; ss. 3—5, lodger's goods; s. 6, appraisement and sale (2 W. & M. c. 5, s. 1); ss. 7—9 (2 W. & M. c. 5, ss. 2—4); s. 10 (8 Anne, c. 14 (18), s. 1); ss. 11—13 (8 Anne, c. 14 (18), ss. 4—7); s. 14 (4 Geo. II. c. 28, s. 1); ss. 15, 16 (4 Geo. II. c. 28,

estate has expired; *Lewis v. Brooks*, 8 U. C. R. 576.

(a) See *Hope v. White*, 17 U. C. C. P. 52, action for double value not confined to landlord only; *McCallum v. Snider*, 6 U. C. L. J. 187, no double costs; *Brown v. Blackwell*, 35 U. C. R. 239, case of misconstruction of lease; *Bell v. Irish*, 45 U. C. R. 167, direction to jury;

Shipman v. Graydon, 5 U. C. C. P. 465, ditto; *McCaskell v. Rodd*, 14 O. R. 282, not applicable where no rent reserved; *Williams v. Thomas*, 25 O. R. 536, conversion; *Clark v. Irwin*, 8 U. C. L. J. 21; *Brillinger v. Ambler*, 28 O. R. 368, both seizure and sale must be illegal to give action for double value.

ss. 5, 6); ss. 17—20 (11 Geo. II. c. 19, ss. 1—4); ss. 21—24 (11 Geo. II. c. 19, ss. 7—10); ss. 25, 26 (11 Geo. II. c. 19, ss. 14, 15); ss. 27—29 (4 & 5 Will. IV. c. 22, ss. 1—3); ss. 30—34 (11 Geo. II. c. 19, ss. 16—20); s. 35 (4 Anne, c. 16, ss. 9, 10). **British Columbia.**

R. S. B. C. 1897, c. 142 (Short Forms of Mortgages), 2nd Schedule, clause 14 (distress clause).

R. S. M. 1902, c. 23 (Church Lands), s. 16, power of distress by trustees. **Manitoba.**

R. S. M. 1902, c. 38 (County Courts), s. 297, landlord's preference over execution; s. 365, no distress under this Act to be deemed unlawful for defect of form, but party aggrieved to have action for special damage.

R. S. M. 1902, c. 49 (The Distress Act), s. 2, mortgagee limited to mortgagor's goods (a); s. 3, landlord's preference over execution limited; s. 5, landlords limited as to goods of third persons; ss. 6—10, costs of distress and extra-judicial seizure.

R. S. M. 1902, c. 58 (The Executions Act), s. 29, list of exemptions (made applicable to landlord and tenant by c. 49, s. 2).

R. S. M. 1902, c. 93 (The Landlords and Tenants Act), s. 29, summary eviction with distress.

R. S. M. 1902, c. 148 (The Real Property Act), ss. 106, 107, mortgagee's power of distress.

R. S. M. 1902, c. 157 (Short Forms of Indentures), 2nd Schedule, clause 14 (distress clause).

R. S. M. 1902, c. 170 (The Manitoba Trustee Act), ss. 59, 60, distress for rent by executors, &c.

C. S. N. B. 1903, c. 153 (Landlord and Tenant), s. 9, notice and appraisement; s. 10, impounding; s. 11, distress within six months; s. 12, goods fraudulently removed; s. 13, right to follow; s. 14, pound breach; s. 15, lodger's goods; s. 16, irregularities; s. 17, distress of growing crops; s. 18, distress by executor; s. 19, arrears within six months; ss. 20, 21, landlord's lien against execution; s. 22, Crown debts; s. 23, fees for distress; s. 26, adoption by mortgagee of mortgagor's lessee; s. 28, holding over; s. 29, plea of general issue by landlord. **New Brunswick.**

C. S. N. B. 1903, c. 188 (Fees), Part XIV., distress for rent.

R. S. N. S. 1900, c. 172 (Tenancies and Distress for Rent), s. 1, no distress unless actual demise at a specific rent; s. 2, sale and appraisement; s. 3, notice of sale; s. 4, unthreshed grain and hay; s. 5, growing crops; s. 6, cattle on common; s. 7, exemption of goods in market not the property of tenant; ss. 8—10, pound breach and irregularities; s. 11, fraudulent removal of goods; s. 12, recovery in case of fraudulent removal; s. 13, six months after determination of term, &c.; s. 14, distress by executors; s. 15, lodger's goods (b); s. 18, landlord's lien as against execution. **Nova Scotia.**

(a) Discussed in *Linstead v. Hamilton Investment Co.*, 11 M. L. R. 247.
Provident and Loan Society, 11 M. L. R. 199; *Miller v. Imperial Loan and In-* (b) See *Gray v. Harris*, 35 N. S. R. 519.

Nova
Scotia.

R. S. N. S. 1900, c. 185 (Fees and Costs): Vol. II. p. 853, fees on distress for rent.

RENT CERTAIN (a).

Ontario.

A rent for a sum certain may be payable in leather (b) or produce (c), perhaps in rails (d). A named proportion, as two-thirds or one-third of a crop, is sufficiently certain (e). Where the amount of rent depends on an arbitration to be held, a distress before arbitration is not legal (f).

Manitoba.

Rent certain may be paid in wheat (g).

TENDER OF RENT (h).

Ontario.

To divest a landlord of his right to distrain a strict legal tender must be shown (i); but the finding of a jury as to tender will not be interfered with (k).

REPEATED DISTRESSES (l).

Ontario.

No sufficient ground for the abandonment of the first distress being shown, a second distress is illegal (m). But where the abandonment is by arrangement with the tenant, a second distress may be made on the expiry of the arrangement; or where he has withdrawn through the fraud of the tenant (n).

Nova.
Scotia.

Where the tenant has committed no act to prevent the landlord getting the benefit of the first distress, the second is not justified (o).

SEPARATE DISTRESSES FOR SEPARATE INSTALMENTS (p).

Manitoba.

It is not illegal to make a second distress for another month's rent although it was due and in arrear at the time of the first distress (q).

(a) P. 285, *supra*.

(b) *Cummings v. Hill*, 6 O. S. 303.

(c) *Thompson v. Marsh*, 2 O. S. 355.

(d) See *Robinson v. Shields*, 15 U. C. C. P. 386.

(e) *Nowery v. Connelly*, 29 U. C. R. 39.

(f) See *Bickle v. Beatty*, 17 U. C. R. 465; *Mitchell v. McDuffy*, 31 U. C. C. P. 266, 649.

(g) *Dick v. Winkler*, 12 M. L. R. 624. See *Mouat v. Clement*, 3 M. L. R. 585, as to distress for failure to fall-plough the land.

(h) P. 287, *supra*.

(i) *Matheson v. Kelly*, 24 U. C. C. P. 598; *Owen v. Taylor*, 39 U. C. R. 358.

(k) *Howell v. Listowel Rink and Park Co.*, 13 O. R. 476.

(l) P. 289, *supra*.

(m) *Lyness v. Sifton*, 13 U. C. C. P. 19; *May v. Seters*, 24 U. C. C. P. 396, request of assignee in insolvency not the request of tenant.

(n) *Harpelle v. Carroll*, 27 O. R. 240.

(o) *Harris v. Wier*, 8 N. S. R. (2 N. S. D.) 466.

(p) P. 290, *supra*.

(q) *McDonald v. Fraser*, 14 Man. L. R. 582.

DISTRESS ON HIGHWAY (a) : FRESH PURSUIT (b).

Cattle may be taken on the highway if driven off the land in Ontario. view of the bailiff (c). The landlord on the day of removal forbade such removal : held a sufficient inception of distress to warrant a seizure on the highway (d).

GOODS OF STRANGER CANNOT BE FOLLOWED (e).

See *McArthur v. Walkley* (f).

FRAUDULENT REMOVAL (g).

The mere removal of goods where rent is in arrear is not New conclusive evidence of fraudulent intent ; it is a question for Brunswick the jury (h).

FRAUDULENT REMOVAL : RENT DUE (i).

Under the law of New Brunswick, in case of goods fraudulently or clandestinely removed there is some authority for the statement that the landlord may follow and distrain within thirty days, although the rent may *not* have been due or in arrear at the time of removal (k).

TIME OF DISTRESS (l).

A distress made after sunset is illegal (m).

MANNER OF ENTRY (n).

A trap door in the loft of plaintiff's house was used by bailiff Ontario. and the distress held illegal (o).

Where a sub-tenant has an outer door it is illegal to break into that apartment to make a distress (p).

(a) P. 290, *supra*.

(b) P. 291, *supra*.

(c) *Halsted v. McCormick*, E. T. 3 Vict. (Dig. Ont. Cas. Law, p. 2007).

(d) *Pulrer v. Yerez*, 9 U. C. C. P. 270.

(e) P. 291, *supra*.

(f) M. T. 4 Vict. (Dig. Ont. Cas. Law, p. 2007) ; cf. *Martin v. Hutchinson*, 21 O. B. 388.

(g) P. 291, *supra*.

(h) *Martin v. Gilbert*, 1 Kerr, 202.

(i) P. 292, *supra*.

(k) *Hoyt v. Stockton*, 2 Han. 60 ; but see *Clarke v. Green*, 1 East. L. R. 552 (1906).

(l) P. 293, *supra*.

(m) *Russell v. Buckley*, 25 N. B. R. 264.

(n) P. 293, *supra*.

(o) *Anglehart v. Rathier*, 27 U. C. C. P. 97.

(p) *McArthur v. Walkley*, M. T. 2 Vict. (Dig. Ont. Cas. Law, p. 1989) ; cf. *Nattrass v. Phair*, 37 U. C. R. 153, breaking windows.

Nova
Scotia.

Where, in order to levy on the goods of the tenant of several rooms, the constable took down a key from a nail in the hall and unlocked the door of the tenant's apartment, held to be a case of outer door and breaking in (*a*).

FORCIBLE ENTRY (*b*).

New
Brunswick.

Breaking open a tenant's building or house in order to distrain for rent renders the distress illegal and not merely irregular (*c*).

Prince
Edward
Island.

If the defendant uses no more force than is necessary to try if the door is fastened, and, in consequence of that, from its insecure fastening it fell in, it is not trespass (*d*).

ABANDONMENT OF DISTRESS (*e*).

Ontario.

Goods left on the receipt of tenant (*f*), or merely on his assurance that he would replevy (*g*), held not abandoned.

Nova
Scotia.

Lapse of twelve days after distress without appraisement, and with the tenant in possession, held to be evidence of abandonment (*h*).

THINGS DELIVERED IN WAY OF TRADE (*i*).

Ontario.

The exemption from distress of goods entrusted to persons carrying on certain trades to exercise their trades upon them is a privilege grounded upon public policy for the benefit of trade (*k*). This privilege has been held applicable to saw-logs in a saw-mill (*l*), to vessels and oak timber in a shipyard (*m*), and to an engine and boiler in a repair shop (*n*); but not to goods consigned for sale (*o*), or to a machine left in an hotel yard (*p*).

New
Brunswick.

Logs delivered to a mill-owner in the way of his trade to be sawn into deals for remuneration are privileged. But the privilege is destroyed if the tenant is a joint owner with others of the logs (*q*).

(*a*) *Miller v. Curry*, 25 N. S. R. 537.

(*b*) P. 293, *supra*. See p. 333, *infra*, and Canadian Notes thereto.

(*c*) *Russell v. Buckley*, 25 N. B. R. 264; *Myers v. Smith*, 4 All. 207, not followed.

(*d*) *McKinnon v. McKinley*, 1 P. E. I. Rep. 113; *Peters*, P. E. I. Dec. 81 (1856).

(*e*) P. 294, *supra*.

(*f*) *Black v. Coleman*, 29 U. C. C. P. 507. See, however, *Roe v. Roper*, 23 U. C. C. P., where tenant was constituted landlord's agent, but more than a month allowed to elapse without further proceedings.

(*g*) *Fenn v. Morrison*, 13 U. C. R. 568.

(*h*) *Naylor v. Bell*, 14 N. S. R. (2 R. & G.) 444; 2 C. L. T. 263.

(*i*) P. 295, *supra*.

(*k*) *Paterson v. Thompson*, 46 U. C. R. 7; 9 A. R. 326.

(*l*) *Ibid*.

(*m*) *Gildersleeve v. Ault*, 16 U. C. R. 401.

(*n*) *May v. Seters*, 24 U. C. C. P. 396.

(*o*) *Hurd v. Davis*, 23 U. C. R. 123.

(*p*) *Mitchell v. Coffee*, 5 A. R. 525.

(*q*) *Guy v. Rankin*, 23 N. B. R. 49.

GOODS IN PUBLIC MARKET (a).

Where defendants let to a tenant certain premises, the upper portion of which was used as a hotel for farmers and a part of the lower flat provided with stalls for the lodgers in which to sell produce to all buyers, and the plaintiff was occupant of a stall, held privileged from distress (b). Nova Scotia.

GOODS IN CUSTODIA LEGIS (c).

A landlord cannot distrain goods held under execution and in custody of the law (d); but *aliter* if the sheriff leaves them with the tenant (e). An assignment for benefit of creditors does not include the landlord seizing before possession taken by the assignee (f). If the purchaser under execution does not remove the goods within a reasonable time the landlord may distrain them (g). Ontario.

CHATTELS IN USE (h).

The actual user of goods of whatever kind exempts them from seizure whether or not there is a sufficiency of other goods (i). Ontario.

BEASTS THAT GAIN THE LAND (k).

It is illegal to distrain sheep, there being other goods sufficient (l). Ontario.

BEASTS OF THE PLOUGH (m).

Damages for distraining beasts of the plough were fixed at what it would have cost the plaintiff to have hired oxen for the several days he was deprived of the use of them (n). Manitoba.

(a) P. 297, *supra*.

(b) *Bent v. McDougall*, 14 N. S. R. (2 R. & G.) 468; 2 C. L. T. 262.

(c) P. 298, *supra*; see p. 322b, *supra*.

(d) *Grant v. Grant*, 10 P. R. 40. For criminal liability for interference with sheriff and his liability for malicious prosecution, see *Beatty v. Rumble*, 210 R. 184; and *Gordon v. Rumble*, 19 A. R. 440.

(e) *McIntyre v. Stata*, 4 U. C. C. P. 248.

(f) *Eacrett v. Kent*, 15 O. R. 9. For distress after possession, see *Linton v. Imperial Hotel Co.*, 16 A. R. 337.

(g) *Hughes v. Towers*, 16 U. C. C. P. 287; cf. *Langton v. Bacon*, 17 U. C. R. 559; *City of Kingston v. Rogers*, 31 O. R. 119.

(h) P. 298, *supra*.

(i) *Miller v. Miller*, 17 U. C. C. P. 226; cf. *Couch v. Crawford*, 10 U. C. C. P. 491, horses driven on premises and tied.

(k) P. 302, *supra*.

(l) *Hope v. White*, 22 U. C. C. P. 5.

(m) P. 302, *supra*.

(n) *Clarke v. Murray*, temp. Wood, 127.

IMPLEMENTS OF TRADE (a).

New Brunswick. A distress is illegal of the tools of the tenant's trade when there are other goods on the premises which could be distrained (b).

DISTRESS CONTRARY TO AGREEMENT (c).

New Brunswick. A distress made in violation of an agreement suspending the right to distrain is a trespass (d).

Nova Scotia. A landlord agreeing with the person supplying furniture to a tenant that it shall be exempt from seizure is estopped from distraining that furniture (e).

Where a promissory note has been given and accepted for rent due, the landlord's remedy by distress is suspended during the currency of the note (f).

PAYMENT OR TENDER AFTER SEIZURE (g).

Ontario. Payment after seizure to the mortgagee of the landlord is equivalent to paying the landlord himself (h).

NOTICE (i).

Ontario. The written notice of distress must be given (k), and is not waived by the tenant telling bailiff that he did not require an inventory (l).

APPRAISEMENT (m).

Ontario. See *Stoddart v. Arder* (n); *Howell v. Listowel Rink and Park Co.* (o); *Maguire v. Post* (p).

Manitoba. The want of sworn appraisers is only an irregularity, and special damage only can be recovered (q).

(a) P. 302, *supra*. See the various statutes of the provinces.

(b) *Rutley v. McMinn*, 2 Pug. 370.

(c) P. 302, *supra*.

(d) *Mooers v. Manzer*, 36 N. B. R. 205, case of second distress; cf. *Green v. Kehoe*, 3 Kerr, 494.

(e) *Fraser v. Wallace*, 11 N. S. R. (2 R. & C.) 337; 2 S. C. R. 522.

(f) *Culpitts v. McCullough*, 32 N. S. R. 502 (1900).

(g) P. 305, *supra*.

(h) *Puffer v. Ireland*, 10 O. L. R. 87 (1905), the mortgagees had served notice on the tenant to pay them the rent.

(i) Pp. 309, 311, *supra*.

(k) *Howell v. Listowel Rink and Park Co.*, 13 O. R. 476.

(l) *Schultz v. Reddick*, 43 U. C. R. 155.

(m) P. 311, *supra*.

(n) 6 O. S. 305.

(o) 13 O. R. 476.

(p) 5 O. S. 1.

(q) *McDonald v. Fraser*, 14 Man L. R. 582, discussion of statutes 2 W. & M. sess. 1, c. 5, and 11 Geo. II. c. 19. s. 19; *Lucas v. Tarleton*, 3 H. & N. 116. and *Rodgers v. Parker*, 18 C. B. 112. followed.

DISTRAINOR NEED NOT SELL (a).

Where a distress has been made, and the goods distrained remain unsold in the landlord's hands, his right of action for rent is suspended (b). **Alberta and Saskatchewan.**

The omission of the defendant to sell the goods will not enable the plaintiff to maintain trespass, the original taking being lawful (c). **New Brunswick.**

TIME ALLOWED BETWEEN DISTRESS AND SALE (d).

There must be five (e) clear days, and it is a question for the jury whether if the landlord does not sell on the sixth he has remained an unreasonable time in possession (f). The purchaser is also allowed only a reasonable time to enter and remove the goods (g). **Ontario.**

PURCHASE BY DISTRAINOR (h).

The general rule that no one can sustain the double character of seller and buyer (i) is subject to the exception that the tenant may consent to the purchase by the landlord (k). **Ontario.**

Even where the sale has been conducted in other respects in a fair and open manner, the landlord cannot be purchaser (l). **British Columbia.**

SPECIAL DAMAGE (m).

Special damages (not full value) recoverable in the case of a second distress (n). **Ontario.**

DAMAGES FOR IRREGULAR SALE (o).

The general rule is that the measure of damages is the difference between the actual value of the goods and the amount **Ontario.**

(a) P. 310, *supra*.

(b) *Smith v. Haight*, 4 Terr. L. R. 387, following *Lehain v. Philpot*, L. R. 10 Ex. 242.

(c) *Rogers v. Buntin*, 2 Kerr, 230.

(d) P. 311, *supra*.

(e) From Feb. 8th to Feb. 12th, sale invalid: *Shultz v. Reddick*, 43 U. C. R. 155.

(f) *Lynch v. Bickle*, 17 U. C. C. P. 549; but see *Anderson v. Henry*, 29 O. R. 719.

(g) *Alway v. Anderson*, 5 U. C. R. 34.

(h) Pp. 303, 312, *supra*.

(i) See *Williams v. Grey*, 23 U. C.

C. P. 561; *Burnham v. Waddell*, 3 A. R. 288. As to officer or member of two corporations, see *Howell v. Listowel Rink and Park Co.*, 13 O. R. 476.

(k) *Woods v. Rankin*, 18 U. C. C. P. 44.

(l) *Tingley v. Sharpe*, 3 West. L. R. 159 (1906), *per* Bole, Co.J., following *Miller v. Singer*, (1903) 2 K. B. 168; 72 L. J. K. B. 578.

(m) P. 312, *supra*.

(n) See *Thompson v. Marsh*, 2 O. S. 355; cf. *Matheson v. Kelly*, 24 U. C. C. P. 598.

(o) P. 313, *supra*.

Ontario. of the rent in arrear (a). But where the sale was after tender, it was held the plaintiff could recover the full value of the goods (b).

Nova Scotia. Where the distress is legal, only the excess may be recovered back; where illegal, the whole amount regardless of any rent due (c).

Where there were irregularities in the distress, such as including articles not distrainable and omission to give notice, but none of the articles were removed but left in possession of tenant and the distress afterwards abandoned, it was held that to entitle plaintiff to damages substantial hurt or injury must be shown resulting from the irregularities (d).

GOODS BELONGING TO STRANGER (e).

Ontario. Where distress is made upon goods belonging in part to the tenant and in part to a third person, such third person cannot compel the landlord to sell those of the tenant first (f).

EXCESSIVE SEIZURE (g).

Ontario. Rent, \$401; value of goods, \$469. Held not sufficient ground for action for excessive distress (h). The receipt of surplus proceeds is not a condonation of a wrongful distress (i). It is not necessary to prove special damage in an action for excessive distress (k).

Manitoba. Nature of an action for excessive distress: see *Pettit v. Kerr* (l).
New Brunswick. For necessary allegations in a suit for excessive distress, see *Preston v. Simonds* (m).

RESCUE AND RECAPTION (n).

New Brunswick. If the goods distrained are afterwards removed by the tenant from off the premises and placed in a building in his possession, the landlord is justified in breaking open the door thereof and retaking the goods (o).

(a) *Shultz v. Reddiok*, 43 U. C. R. 155.
 See *Stone v. Brooks*, 2 Ont. W. R. 306;
 3 Ont. W. R. 482, 527; 7 Ont. W. R. 463,
 732 (1906).

(b) *Howell v. Listowel Rink and Park Co.*, 13 O. R. 476.

(c) *Netting v. Hubley*, 26 N. S. R. 497.

(d) *Beckham v. Hickey*, 38 N. S. R. 55 (1905), discussion of R. S. N. S. (1900) c. 172, s. 10.

(e) P. 313, *supra*.

(f) *Pegg v. Starr*, 23 O. R. 83.

(g) P. 314, *supra*. For distinction between illegal distress and excessive

distress as a cause of action, see *Preston v. Appleby*, 27 N. B. R. 92.

(h) *Huskmann v. Lawrence*, 26 U. C. R. 570.

(i) *Robinson v. Shields*, 15 U. C. C. P. 386.

(k) *Black v. Coleman*, 29 U. C. C. P. 507.

(l) 5 M. L. R. 359.

(m) 1 Han. 44.

(n) P. 316, *supra*.

(o) *De Grouchy v. Sirret*, 30 N. B. R. 104. See *Dale v. O'Brien*, 26 N. B. R. 118, preventing a rescue, how plead: in action for assault.

DISTRESS DAMAGE FEASANT MUST BE AT TIME OF TRESPASS (a).

The defendant seized plaintiff's oxen, damage feasant, in his wheat field, but being unable to find a pound-keeper, turned them loose. They returned, damage feasant, to his meadow the same evening and he impounded them, giving a statement of damage to wheat and making no claim as to the meadow. Held, the damage to the wheat had been abandoned; and impounding and sale illegal (b).

An animal pursued by the owner and being led out of the field is not distrainable (c).

The law as to distress damage feasant shades into what is commonly known as "line fence law" (d).

DISTRESS BY COURT (e).

Provisions for levying penalties by "warrant of distress" are frequent in our statutes:—

E.g., Criminal Code of Canada, ss. 738—745, summary convictions, recovery of costs by distress; s. 742, distress for costs on goods of prosecutor when complaint dismissed; s. 759, recovery of costs.

Many of the Dominion statutes make specific provision for the levy of penalties by distress:—*E.g.*, R. S. C. 1906, cc. 51 (f), 93 (g), 113 (h), 36 (i), 45 (k), 85 (l), 87 (m), 86 (n), 52 (o).

The provinces also in some statutes use the term "distress" for the levy used to collect penalties or enforce payments:—

E.g., R. S. O. 1897, c. 90 (Summary Conviction), s. 4 (4), Ontario. recovery of costs by distress.

R. S. O. 1897, c. 157 (Master and Servant), s. 16, warrant of distress for wages.

R. S. M. c. 101 (Liquor Licences), s. 143, distress for value of property bartered for liquor, Manitoba.

R. S. M. c. 116 (The Municipal Act), ss. 365, 627 (b), 783, enforcement of penalties by distress.

(a) P. 320, *supra*.

(b) *Buist v. McCombe*, 8 A. R. 598, pound-keeper also liable, sale having been forbidden by plaintiff. See also *Graham v. Spettigue*, 12 A. R. 261.

(c) *McIntyre v. Lockridge*, 28 U. C. R. 204.

(d) See *McSloy v. Smith*, 26 O. R. 508; *Ives v. Hitchcock*, Dra. 247; *Stedman v. Wasley*, 1 U. C. R. 464; *Crouce v. Steeper*, 46 U. C. R. 87; *Wickson v. Pickard*, 25 U. C. R. 307; *Spafford v. Hubbell*, M. T. 2 Vict. (Dig.

Ont. Cas. Law, p. 1979); *Ibbottson v. Henry*, 8 O. R. 625.

(e) P. 321, *supra*.

(f) Inland Revenue (s. 132).

(g) Immigration (s. 66).

(h) Shipping (s. 345).

(i) Government Railways Act (s. 79).

(k) Fisheries (s. 98).

(l) Inspection and Sale (s. 44).

(m) Gas Inspection (s. 62).

(n) Petroleum Inspection (s. 39).

(o) Weights and Measures (s. 78).

DISTRESS FOR TAXES (a).

- Ontario.** While the procedure for enforcement of payment of taxes may be an execution rather than a distress, as stated in the text, our Courts have no hesitation in giving damages for *illegal distress* where the procedure is incautiously applied (b).
The following are some statutory provisions for this quasi-distress. It is to be noted that the New Brunswick statute terms the procedure an "execution":—
- Ontario.** 4 Edw. VII. c. 23 (Assessment Act), ss. 103—108.
- Alberta and Saskatchewan.** C. O. N. W. T. 1898, c. 70 (Municipal), s. 147.
- British Columbia.** R. S. B. C. c. 179 (Taxes on Property), s. 87.
- Manitoba.** R. S. M. 1902, c. 117 (The Assessment Act), s. 115, distress for poll tax; s. 129, distress for municipal taxes.
R. S. M. 1902, c. 135 (The Provincial Licence Act), s. 30, distress for rents due to the Crown.
R. S. M. 1902, c. 166 (The Railway Taxation Act), s. 9, distress (for taxes) on goods of railway company.
- New Brunswick.** C. S. N. B. c. 170 (Rates and Taxes), s. 84, execution against ratepayer.
- Nova Scotia.** R. S. N. S. 1900, c. 73 (Assessment), s. 93.

(a) P. 321, *supra*.

(b) *Eg.*, *Donahue v. Campbell*, 2 O. L. R. 124; *McKinnon v. McTague*, 1 O. L. R. 233; *City of Toronto v. Custom*, 30 S. C. R. 390, distress in a subsequent year, when permissible; *L'oyd v.*

Walker, 4 O. L. R. 112 (1902). Cf. *Sawyers v. City of Toronto*, 2 O. L. R. 717; 4 O. L. R. 624; *Waechter v. Pinkerton*, 6 O. L. R. 241; *Vedder v. Chadsey*, 1 B. C. R. Pt. II. 76.

CHAPTER XIII.

TRESPASS TO LAND AND DISPOSSESSION.

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TRESPASS consists in any unjustifiable intrusion upon a person's possession. Possession is the technical name given to the present enjoyment of a definite portion of the soil by a person intending to enjoy it as owner. Possession may be either with title or without.

Definition of possession.

A party claiming to have possession without title must, in order to give him what the law understands by possession, and to enable him to bring an action of trespass, show that he has a *de facto* possession, that is to say, actual physical prehension of the particular portion of the soil, to the substantial exclusion of all other persons from participating in the enjoyment of it. What amounts to such a *de facto* possession must in all cases be a question of degree, but the physical prehension must extend over substantially the whole subject-matter over which possession is claimed. "If there were an inclosed field, and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common" (a). So one who works part of a seam of coal does not thereby acquire a *de facto* possession of the whole seam (b).

Possession without title.

Must be substantially exclusive.

(a) *Per* Bramwell, L.J., *Coverdale v. Charlton*, (1878) 4 Q. B. D. p. 118. (1871) 19 W. R. 444; *Ashton v. Stock*, (1877) 6 Ch. D. 719.

(b) *Earl of Dartmouth v. Spittle*,

It is obvious that two persons claiming adversely cannot be in possession of the same portion of the land at one and the same time, therefore a person claiming without title cannot be said to have a *de facto* possession unless the true owner has been dispossessed. In one case a road, the soil and freehold of which was in the plaintiff, ran from a highway to a well, the land on each side of the road belonging to the defendant, and the public, by virtue of a dedication by the plaintiff's predecessor in title, exercised a right of passage over the road to the well. The defendant built a wall across the mouth of the road, leaving a stile for foot-passengers to the well, and levelled the fences on each side of the road so as to throw it and the adjoining fields into one close, and this state of things continued for upwards of twenty years, after which the defendant further obstructed the road. It was held that the plaintiff might, in virtue of his ownership of the soil of the road, maintain trespass for such obstruction, for that the public, by exercising the right of passage, which they derived under the freeholder, kept his title and possession alive, so that the defendant never had the exclusive possession of the soil, and consequently had not acquired a statutory title to it (a).

Where, however, there is a right of way appurtenant only to a particular tenement a subsequent enlargement of the user of such way for the benefit of new buildings, will be restrained by injunction (b).

Nor, apparently, does the public user of country field paths, by permission, raise any presumption from which dedication may be inferred (c). And a similar rule has been held to apply in spite of the fact that the *terminus ad quem*, to which the paths led, was admittedly a public gathering place for religious legislative or political purposes at a period long anterior to the date from which the present proprietor deduced his title (d).

If, however, a person be in occupation without title of a strip

(a) *Tottenham v. Byrne*, (1861). The decision of this case by the Exchequer Chamber is unreported, except in the judgments in *Reilly v. Thompson*, (1877) 11 Ir. Rep. C. L. 238; and see *Littledale v. Liverpool College*, (1900) 1 Ch. 19, A. C.

(b) *Harris v. Flower*, (1905) 91 L. J. 816. C. A.

(c) *Behrens v. Richards*, (1905) 71 L. J. Ch. 615.

(d) *Att.-Gen. v. Antrobus*, (1905) 71 Ch. 188.

of land, over which other persons are in the habit of using a way not by the dedication or permission of the freeholder but as trespassers, then user of the way by such persons does not, as matter of law, prevent such occupation of the land from amounting to possession, but it is matter of evidence for the jury that the occupation was not substantially exclusive (a). And the same principle seems to apply where the parties using the way do so under a title not derived from the freeholder. Thus, where a person for a long time enjoyed the exclusive pasturage over certain strips of grass at the sides of a private road, which had been set out under an enclosure award for the use of the owners of certain lands in the neighbourhood, the soil of which road apparently was vested in the owners of the adjoining lands or in the lord of the manor, it was held that the party enjoying the pasturage did not by such enjoyment acquire the possession of the strips so as to entitle him to sue another person for depasturing cattle there, seeing that the exercise by the parties entitled thereto of their right of passage over the whole width of the road, including the strips of grass, prevented his user from being exclusive (b); but the Court seems to have treated the question as one of fact, not of law (c).

But further, in order that occupation may amount to what the law understands by possession, not only must it be exclusive, but it must also have been had *animo possidendi*: the party claiming to have had possession must have intended to deal with the land as owner. "The corporeal act by which possession is acquired must be accompanied by a definite act of the mind in order to enable possession actually to arise" (d). "*Apiscimur possessionem corpore et animo, neque per se animo, aut per se corpore*" (e).

Must be had
animo possi-
dendi.

(a) *Reilly v. Thompson*, (1877) 11 Ir. Rep. C. L. 238; and see as to Possessory Right, *Exery v. Smith*, (1857) 26 L. J. Ex. 344.

(b) *Coverdale v. Charlton*, (1878) 4 Q. B. D. 104.

(c) See judgment of Bramwell, L.J. This may possibly be the explanation of the decision of the Court of Appeal in *Haigh v. West*, ((1893) 2 Q. B. p. 31), that the churchwardens and overseers of a parish, who by their tenants had

enjoyed for the statutory period the pasturage of certain lanes over which there was a public right of way, had acquired a title to the lanes under the Statute of Limitations. The point, however, was not much discussed, and the case was mainly decided on other grounds.

(d) Savigny on Possession, Bk. 2, s. 21.

(e) Dig. 41, Tit. 2, s. 3.

In *Leigh v. Jack* (a), the plaintiff had laid out a strip of land as a street, but for certain reasons had never dedicated it to the public, and it was never in fact used by the public. The defendant, who was the owner of an adjoining iron foundry, used the strip of land for upwards of twenty years for the purpose of depositing boilers and refuse from his foundry upon it, but did so knowing that the street was intended to be ultimately dedicated to the public, and that until dedication it was useless to the plaintiff, and merely used the soil in the interval as a temporary convenience, and not in the assertion of ownership, or with the intention of infringing the plaintiff's rights. It was held that the user by the defendant did not amount to possession, and consequently, though extending over upwards of twenty years, conferred no title (b).

Possession of surface *primâ facie* includes possession of minerals.

One who without title acquires possession of the surface of land, *primâ facie* thereby acquires possession of the minerals also (c), even though they be unopened, for possession of the surface *primâ facie* operates to exclude others from access to the minerals: but that presumption is always liable to be rebutted by showing that the possession of the minerals was in fact in somebody else, for the minerals may be worked from the adjoining land, and apparently even a wrongdoer may, by driving levels through a whole seam of coal, acquire possession of the unworked coal within the limits to which the levels extend (d). But this rule does not apply against other than subsequent tort-feasors in cases where the first wrongdoer originally obtained the possession by means of a concealed or fraudulent trespass, and where (owing to ignorance) there was no *laches* on the part of the true owners, against whom the Statutes of Limitation do not run (e).

Although in order to constitute actual fraud, so as to prevent the Real Property Limitation Acts from running, the tort complained of must be something more than a mere negligent

(a) (1879) 5 Ex. D. 264.

(b) See judgment of Cockburn, C.J., p. 271. And in *Coverdale v. Charlton*, (1878) 4 Q. B. D. p. 122, Brett, L.J., to a great extent rested his judgment on the absence of an *animus possidendi*.

(c) *Per* Parke, B., *Smith v. Lloyd*, (1854) 9 Exch. p. 574.

(d) See *per* Hall, V.-C., *Ashton v. Stock*, (1877) 6 Ch. D. p. 726.

(e) *Bulli Coal Mining Co. v. Osborn*, (1899) A. C. 351.

encroachment by the wrongdoer, even though such negligence may have resulted in damage to the true owner (a).

A possession which satisfies the above-stated conditions, viz., that of being substantially exclusive, and that of being enjoyed *animo possidendi*, confers during its continuance an interest in the subject-matter of the possession as against all who cannot show a title to it; it gives a right to retain the possession and undisturbed enjoyment as against all wrongdoers. He who has such a possession may, just as may the lawful owner, use a reasonable degree of force in its defence (b). He may sue in trespass anyone who disturbs his possession, and in such an action not only is it not incumbent on the plaintiff to show a title, but it is no answer for the defendant to show that the title and right to possession is in another person; *jus tertii* is no defence to the action, unless the defendant can show that the act complained of was done by the authority of the true owner (c). Nor does it matter how recently the possession was acquired (d). This protection which the law gives to bare possession seems to be nothing more than an extension of the protection that it accords to the person (e); possession implies to some extent personal presence, and "the inviolability of the person extends to those sorts of disturbance by which the person might at the same time be interfered with" (f): In other words the explanation of the protection is to be found in the paramount necessity of preventing breaches of the peace.

To an action of trespass *jus tertii* is no defence.

Moreover, in an action of trespass at the suit of a bare possessor the defence of the *jus tertii* is apparently, in addition to being no defence to the action, no ground for mitigation of damages (g). A bare possessor being entitled to recover the

(a) *In re Astley and Tyldesley Coal Co. and Tyldesley Coal Co.*, (1899) 80 L. T. 116.

(b) *Green v. Goddard*, (1704) 2 Salk. 641; *Weater v. Bush*, (1798) 8 T. R. 78.

(c) *Graham v. Peat*, (1801) 1 East, 244; *Chambers v. Donaldson*, (1809) 11 East, 65. It was indeed in early times supposed that in a case of trespass to land as opposed to trespass to goods, on a plea of justification under command of the owner, the averment of command

was not traversable, in other words that *jus tertii* was a defence (*Trevilian v. Pine*, (1705) 1 Salk. 107). But this doctrine was exploded in the above cases.

(d) *Cutteris v. Cowper*, (1812) 4 Taunt. 547.

(e) *Per* Lord Denman, *Rogers v. Spence*, (1844) 13 M. & W. p. 581.

(f) Savigny on Possession, Bk. 1 s. 6.

(g) In an American case of *Cutts v.*

same measure of damages as if he were the owner, for possession is *prima facie* evidence of title, which cannot be displaced by merely showing that the possession was of recent origin and was not derived from any person who had title (a).

And *à fortiori* the above rule applies where the person injured by the trespass is a licensee of the Crown, legally interested in the soil for a specific purpose, such as the cutting of timber (b).

How possession without title may be lost.

A bare possessor who voluntarily abandons possession and goes away without any intention of returning loses his possession for all purposes (c), and is in the same position as if he had never been in possession at all.

If a possessor without title is expelled by a trespasser who has himself no title he may lose his possession by submitting to the expulsion, or by delaying to re-expel the intruder within a reasonable time. But in the absence of submission and until the expiry of a reasonable time expulsion by a mere trespasser does not divest the possession. In the case of *Browne v. Dawson* (d) the defendants, trustees of a school, dismissed the plaintiff, the master of the school, and locked the door; the plaintiff subsequently broke open the door, entered and continued in possession without acquiescence on the part of the defendants for ten days, when they forcibly ejected him. To an action of trespass for the ejection they pleaded only a plea of "not possessed," omitting to plead "*liberum tenementum*." It was held that notwithstanding that there was no plea raising the question of title, and that the defendants were consequently to be treated as having a mere possessory interest, the plaintiff could not succeed. "A mere trespasser," said Lord Denman, "cannot by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom

Spring, (1818) 15 Mass. 135, the defendant cut down some trees on land of which the plaintiff was in bare possession. It was held that the plaintiff could, in an action of trespass, recover the value of the trees, notwithstanding that the true owner could be shown. But the ground of the decision was that the plaintiff would be liable over to the true owner in an action for mesne profits.

The principle laid down in this case is

carried farther in *The Winkfield*, (1902) P. 42, in which damages were awarded although there was no liability over.

(a) See below, p. 360, on the subject of Ejectment.

(b) *Glenwood Lumber Co. v. Phillips*, (1904) A. C. 405, P. C.

(c) *Trustees, Executors and Agency Co. v. Short*, (1888) 13 App. Cas. 793.

(d) (1840) 12 A. & E. 624.

he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession." What will be considered to be without delay must depend upon the circumstances of each particular case; in the above case ten days was considered a reasonable time. One remedy then which a bare possessor has for an expulsion by a trespasser is at once to turn out the intruder and reinstate himself, and for this purpose the law sanctions a resort to force. He may break open the outer door, or do any other act of violence necessary to effect an entry, without liability to indictment under the Statutes of Forcible Entry; for it is an essential condition of the establishment of a charge of forcible entry that the party upon whose possession the entry is made should have had the legal possession for civil purposes (a), and this *ex hypothesi* the intruder has not. Such an entry by the possessor is to be treated as a forcible resistance of an intrusion upon a possession which he had never lost; and as above pointed out a forcible defence of an existing possession may always be justified provided the force is not excessive. But in cases in which the true owner of the land can be shown it may be that such re-entry is the only practical remedy. In such cases the party dispossessed cannot bring ejectment, for the plaintiff in ejectment must prove his title, and though, as stated above (b), mere prior possession raises a *primâ facie* presumption of ownership in fee, that presumption is always liable to be rebutted by its being shown who the true owner is (c). It is no doubt said that a bare possessor who has been ousted by a wrongdoer may bring an action to recover damages not only for the ouster itself, but also for the keeping out of possession (d). But what is the measure of damages in such form of action seems never to have been clearly determined. It cannot be the value of the land, for if it were, no plaintiff who was doubtful of his title would ever have thought of suing in ejectment. At the most the keeping out of possession can only be regarded as an aggravation of the original trespass,

Remedy of
bare possessor
for wrongful
expulsion.

(a) *Per* Lord Selborne, *Lowe v. Telford*, (1876) 1 App. Cas. p. 427.

(b) p. 327.

(c) See below, p. 360.

(d) See the form of count for a common expulsion in Chitty on Pleadings, 7th ed., vol. 2, p. 659, and note thereto.

from which point of view the damages may possibly be in the discretion of the jury.

A bare possession of land without title, provided it satisfies the two above-mentioned conditions, of being substantially exclusive and of being had *animo possidendi*, will by virtue of the Statutes of Limitation (a) in due course of time mature into a title. Provided the original possession be not tainted by "concealed fraud," in which case, as already stated (b), Statutes of Limitation do not run against the true owner.

Possession
with title.

In the early periods of the history of our law might seems to some extent to have been confounded with right, and actual possession to have been more highly favoured than property or the legal right to possession. Where at the time of the commission of any trespass upon land the owner happened to be out of possession, either by reason of his having been wrongfully ousted or by reason of his having neglected to enter into possession upon the accrual of his title, he seems to have been without remedy for such trespass.

Trespass by
relation.

In course of time, however, the injustice of not extending to the right to possession the remedies which were allowed to bare possession came to be recognised, and a legal fiction was introduced whereby the party having the right to possession was, upon entry, deemed to have been in possession from the date when his right of entry accrued. This doctrine of possession by relation obtained as between disseisor and disseisee as far back as the reign of Henry VI. (c), and its application was down to comparatively recent times considered to be confined to that particular case (d); but in 1855 the doctrine was extended to the case of heir and abator (e), and three years later was applied to the case of entry by an assignee of a lease (f), since which time it must be taken to be of general application. "That is the ordinary doctrine on which actions for mesne profits are founded; you look at the date of the title, and after entry consider the

(a) As to which see below, p. 363
sqq.

(b) See p. 182.

(c) Rolle Abr. Trespass per Relation. T.

(d) See *per* Parke, B., *Litchfield v.*

Ready, (1850) 3 Exch. p. 944.

(e) *Barnett v. Earl of Guildford*
(1855) 11 Exch. 19.

(f) *Radcliffe v. Anderson*, (1858)
E. B. & E. 819.

party entitled to have been then in possession" (a). The Courts, however, did not go the whole length of treating the right to possession as *per se* equivalent to possession; they still require (b) that a plaintiff who seeks to recover damages for a trespass committed while he was out of possession should, before action brought, go through the form of entry, or, which is equivalent, of making a formal claim.

A right to the immediate possession of land is converted into Entry. actual possession by entry upon any part of it, or by the making of a claim to it in its immediate neighbourhood, provided that there has been due compliance with all necessary preliminary statutory requirements (c). The mere putting of the foot or any part of the person across the boundary is sufficient to constitute entry. Thus, where one being entitled to a house, and being unable to enter at the door, tried to get in through the window, and when half in and half out was pulled out again by the heels, the entry was considered enough to entitle him to an assize (d). Where the party entering does so under a right of entry, his entry upon any part of the land vests in him the possession of the whole of the land to which his title relates and which is situate in the same county, and is not at the time of such entry in the possession of more than one wrongdoer. If different portions of the land, the right to which is derived under the same title, are situate in different counties, then, in order to get possession of each portion, he must make a separate entry on each portion, as also where different portions in the same county are in the possession of different wrongdoers (e). If the party entitled is afraid to make an actual entry, it is sufficient if he goes as near the land as he dare and makes claim to it; this claiming of the land is of the same effect as entry, and if repeated from time to time the continuance in possession of the disseisor is a new disseisin *toties quoties* (f), for the purpose, that is to say, of enabling the person entitled to bring trespass so long as his title remains unbarred, but not for the purpose of preventing the Statute of

(a) *Per* Williams, J., *ibid.*, p. 824.

(b) As to the case of mesne profits see next page, note (c).

(c) *In re Riggs, Ex parte Lorell*, (1901) 2 K. B. 16.

(d) Cited in Watkins on Descents, 4th ed. p. 53

(e) *Ibid.*, p. 54.

(f) Com. Dig. Claim, A. 1.

Limitations from running (a). Nor does the fact of a landlord entering from time to time upon premises, in respect of which he had received no rent for over twelve years, for the purpose of doing repairs, prevent the Statute of Limitations running against him (b). Entry or claim by agent is enough to vest the possession in the principal. The entry which is necessary to make the doctrine of relation apply being a mere form, it seems that, as regards a plaintiff's right to bring an action, the cases of land and goods stand practically upon the same footing, that is to say, that he may sue who has either the possession or the right to possession at the date of the trespass committed, subject to this, that in the case of trespass to land the plaintiff must, where he relies on the right to possession and not on the actual possession, go through the form of entry or claim before taking out his writ (c). It does not seem, however, to have been expressly decided how far this doctrine of relation will apply where the party entering had at the time of the trespass only an inchoate title to the land; as, for instance, where a trespass is committed to a glebe after institution, but before induction of the parson, the party instituted becoming by institution parson for spiritual purposes, but having before induction no complete title to the temporalities (d): or again, where the plaintiff has a mere equity to call for a legal title; as, for instance, where a tenant enters under an agreement for a lease and sues a stranger for a trespass committed between the date of the agreement and that of entry; though possibly, since the Judicature Acts, one who so enters under an agreement for a lease is to be regarded for such purposes as in the same position as one who enters under an actual lease (e).

(a) 3 & 4 Will. IV. c. 27, ss. 10, 11.

(b) *Lynes v. Snaith*, (1899) 1 Q. B. 486.

(c) To the rule that trespass by relation cannot be set up except where the plaintiff has entered before writ the case of a claim for mesne profits, as against a stranger, presumably does not form any exception. No doubt by Ord. 18, r. 2, of the Rules of the Supreme Court, 1883, it is provided that: "No cause of action . . . shall be joined with an action for the recovery of land, except claims in respect of mesne pro-

fits, &c." But the rule does not, it is conceived, do away with the necessity of entry before writ, in the cases to which it applies; for, as has been frequently said, the Judicature Act is merely a statute of procedure, and does not alter the rights of parties.

(d) See *Hare v. Bickley*, (1577) Plowd. p. 528.

(e) See *Walsh v. Lonsdale*, (1882) 21 Ch. D. p. 14; *Allhusen v. Brooking*, (1884) 26 Ch. D. p. 564; *Louther v. Heaver*, (1889) 41 Ch. D. p. 264.

The legal effect of entry by a person entitled is not in any way affected by the fact that another who, without title, was previously in possession persists in remaining upon the land concurrently with the true owner. "As soon as a person is entitled to possession, and enters in assertion of that possession . . . the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser" (a). Though two or more persons may be concurrently in possession as joint tenants or tenants in common, there can be no such thing as concurrent possession by two persons claiming adversely to one another.

Effect of
entry.

A party having a right to the possession of land must not effect his entry with force, otherwise he will render himself liable to a criminal prosecution under the Statutes of Forcible Entry (b), the first of which provides that "none shall make entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand nor with multitude of people, but only in a peaceable and easy manner," on pain of imprisonment. The second of those statutes makes a forcible detainer a substantive offence if preceded by a forcible entry; while the third makes a forcible detainer after a peaceable entry an offence, but this must be understood to refer only to the case of an entry which though peaceable was yet unlawful, as being without title (c). An entry is forcible within the meaning of the statutes where it is effected by breaking open *outer* doors or windows, even though there be no one in the house at the time (d), or where it is accompanied with actual personal violence or even threats of personal violence (e); but entry gained by unlocking a

Forcible
entry.

(a) *Per Maule, J., Jones v. Chapman*, (1847) 2 Exch. p. 821, approved by Lord Selborne, in *Louis v. Telford*, (1876) 1 App. Cas. p. 426.

(b) 5 Rich. II. c. 7; 15 Rich. II. c. 2, 8 Hen. VI. c. 9.

(c) *Rez v. Oakley*, (1832) 4 B. & Ad.

307.

(d) Com. Dig. Forcible Entry, A. 2; and see *Turner v. Mcymott*, (1823) 1 Bing. 158.

(e) Hawkins, P. C., Vol. 1, p. 501; and see *Reg. v. Studd*, (1866) 14 W. R. 806.

door with a key or by means of an artifice is justifiable (a). Whether breaking open the gate of a field, as opposed to the door of a house, would be a forcible entry, seems to depend upon whether the complainant himself, or some person acting as his agent to retain possession, were in the field at the time; it is not enough that he should have left his cattle there (b). A man's field, unlike his house, is not his castle. Breaking an *inner* door of a house is not a forcible entry, even though there be persons in the room (c). But though a person who, having the right of possession, exercises his right of entry in a forcible manner, is criminally indictable therefor, the better opinion seems to be that he is not civilly responsible in damages to the party who was in possession, even though, having entered, he expels him; because the entry, although criminal, vests nevertheless the legal possession in the owner, together with all the legal incidents that attach to possession (d). There has, however, been a great diversity of opinion on this subject. In *Hillary v. Gay* (e) Lord Lyndhurst ruled at *nisi prius* that a landlord who, on the expiry of his tenant's term, turned the tenant's wife and furniture out into the street, was liable in damages, because, "if the defendant had a right to the possession he should have obtained that possession by legal means," that is to say, should have brought ejectment. In *Newton v. Harland* (f) the majority of the Court of Common Pleas, *dissentiente* Coltman, J., held that a civil action would lie for entering and expelling the plaintiff, if the entry was forcible, even though the expulsion was with no unnecessary violence, because such entry being unlawful could not vest the possession in the owner so as to entitle him to treat the other party as a trespasser. And this view has been adopted by Fry, J., in the two most recent cases on the subject (g). On the other hand, in *Harvey v. Brydges* (h) the Court of Exchequer questioned the decision in *Newton v. Harland*, and adopted the view of

(a) Com. Dig. Forcible Entry, A. 3. It has been said that taking the roof off a house is not a forcible entry (*Jones v. Foley*, (1891) 1 Q. B. 730). *Sed quære?*
 (b) Bac. Ab. Forcible Entry, B.
 (c) *Per* Coltman, J., *Newton v. Harland*, on third trial, (1840) 1 M. & G. p. 669.

(d) And see *Turnor v. Meynott*, (1823) 1 Bing. 158.
 (e) (1833) 6 C. & P. 284.
 (f) (1840) 1 M. & G. 644.
 (g) *Beddall v. Maitland*, (1881) 17 Ch. D. 174; *Edwick v. Hawkes*, (1891) 18 Ch. D. 199.
 (h) (1845) 14 M. & W. 437.

Coltman, J. "If it were necessary," said Parke, B., "to decide (the point raised in *Newton v. Harland*), I should have no difficulty in saying, that where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it, even though in so doing a breach of the peace was committed" (a). And in *Blades v. Higgs* (b), Erle, C.J., treats the case of *Harvey v. Brydges* as having overruled that of *Newton v. Harland*. In *Pollen v. Brewer* (c) it was held that no action would lie against a landlord for expelling a tenant at will upon determination of the will. So too in *Burling v. Read* (d), it was held that a landlord who was entitled to the possession of a workshop in the occupation of the plaintiff could justify in a civil action entering and pulling the workshop down, although the plaintiff was inhabiting it and actually present in it at the time. In *Beattie v. Mair* (e) a forcible entry by a mortgagee who had a right of entry on default was held to be not actionable. And in *Lows v. Telford* (f) Lord Selborne apparently approves of the dictum of Parke, B., in *Harvey v. Brydges*. The weight of authority, therefore, seems to be in favour of the view taken in the text.

If a person entitled to the possession of premises can manage to get in without committing a forcible entry, even though he does so by means of an artifice, he may then justify using force to defend his possession so acquired without rendering himself liable even to a criminal prosecution. He may justify forcibly expelling a trespasser, and it makes no difference that the trespasser was on the premises before the owner. An expulsion, after a peaceable entry by a party having title, does not make

Forcible
expulsion by
owner who
has entered
peaceably.

(a) See, too, *per* Lord Kenyon, *Tauntton v. Costar*, (1797) 7 T. R. p. 432.

(b) (1861) 10 C. B. N. S. 713.

(c) (1859) 7 C. B. N. S. 371.

(d) (1850) 11 Q. B. 904

(e) (1882) L. R. Ir. 10 C. L. 208. In this case, however, there was no averment of any assault.

(f) (1876) 1 App. Cas. p. 426

the entry forcible (a). The party so entering, however, must be careful to request the other to depart before he can justify laying hands on him to turn him out (b), and in no case must he use more force than the occasion requires ; for any violence in excess of what is reasonably necessary to effect the expulsion the owner will be liable (c). It is in the danger of the jury finding the fact of excessive violence having been used that the practical objection to resorting to this mode of ejectment by force mainly lies ; and having regard to that danger, where possession is sought to be recovered of land in the occupation of a wrongdoer, it is in general advisable to have recourse to the remedy by action.

Where there is title the possession need not be exclusive.

The possession of a person who, having title to the land, has entered, continues in him until he has been dispossessed, that is to say, until some other person has acquired a *de facto* possession as above defined. His possession differs from that of a person who has no title in this, that it need not be exclusive ; the fact that others are in the habit of wrongfully using a way over his land will not cause him to be any the less in possession of the soil of the way, for his title will, in such case, give him the constructive possession. And further, this constructive continuity of possession which title gives in cases in which actual possession has once been acquired by entry or otherwise, will prevent mere non-user from being construed as an abandonment (d).

What may be subject of possession.

For the purposes of possession not only may the soil be regarded as capable of division into areas greater or smaller by lines drawn across the surface, but each of such areas again may be subdivided into layers, each of which layers may be the subject of a separate possession. Thus the owner of a manor may be in possession, by his commoners, of the pasturage on the surface of the waste, concurrently with another person being in possession of the peat immediately under the surface (e), while yet a third person may be in possession of the minerals below

(a) *Per* Coltman, J., at *nisi prius* on the third trial of *Newton v. Harland*, (1840) 1 M. & G. p. 670. From this ruling error was not brought. But see *Per* Fry, J., in *Edwick v. Hawkes*, (1881) 18 Ch. D. 199, *contra*.

(b) *Green v. Goddard*, (1704) 2 Salk. 641.

(c) *Gregory v. Hill*, (1799) 8 T. R. 299 ; *Collins v. Renison*, (1754) 1 Sayer. 138 ; but see *Edwick v. Hawkes*, (1881) *supra*.

(d) *Smith v. Lloyd*, (1854) 9 Exch. 562.

(e) *Wilson v. Mackreth*, (1766) 3 Burr. 1824.

the peat. And each of such parties will be entitled to sue in trespass or expel by force a stranger trespassing on the subject-matter of his possession. Thus, where A. was seised in fee of a close, to the exclusive possession of the pasturage of which B. was entitled during a portion of the year, it was held that A. might maintain trespass against one who during that period drove posts and tent-pegs through the grass into the subsoil (a), but not against one who merely rode over the grass during that period, the cause of action in respect of such riding, if unauthorised, being in B. (b). Anything attached to the soil, such as grass-plants (c), trees, underwood, &c., may be the subject of a separate possession wholly independent of any possession of the soil adjoining or underneath such plants. Thus, where a lord of a manor granted by copy to the plaintiff an exclusive right of cutting underwood in the *locus in quo*, and subsequently leased the manor to another who cut down some of the underwood, it was held that the plaintiff might maintain trespass against the lessee notwithstanding that under his grant by copy no interest in the soil as distinguished from the shrubs passed to him (d). In this case the plaintiff could not have sued a person for merely trespassing in the wood by walking between the shrubs, for that would not have been any invasion of his possession; the cause of action in respect of such trespass would have been in the lessee of the manor. "If a man has twenty acres of land and by deed granteth to another and his heirs *vesturam terræ* and maketh livery of seisin *secundum formam chartæ*, the land itself shall not pass, . . . but he (the grantee) shall have an action of trespass *quare clausum fregit*. The same law if a man grant *herbagium terræ*" (e).

Whether the maxim *Cujus est solum ejus est usque ad cælum* is to be accepted literally as meaning that the ownership of land

Whether the air space above the soil is the subject of possession.

(a) *Cox v. Glue*, (1848) 5 C. B. 533.

(b) *Cox v. Mousley*, (1848) *ibid.*

(c) *Welden v. Bridgewater*, (1592) F. Moore, 302; *Crosby v. Wadsworth*, (1805) 6 East, 602; Co. Litt. 4b. It should be observed that *fructus industriales* are treated as mere chattels even before severance (*Evans v. Roberts*, (1826) 5 B. & C. 829).

(d) *Hoe v. Taylor*, (1593) F. Moore, 355; and see *Glenwood Lumber Co. v. Phillips*, (1904) A. C. 405, P. C.

(e) Co. Litt. 4b. When he says that the land itself shall not pass, Lord Coke is obviously referring to the soil as distinguished from the grass growing on it.

carries with it the possession of the column of air situate above it, or whether it is to be interpreted as meaning merely that a landowner is entitled to complain of any occupation by others of the space above him which materially interferes with his enjoyment of his land, seems doubtful. In *Pickering v. Rudd* (a) Lord Ellenborough took the latter view; he ruled that trespass would not lie for causing a board to project over the plaintiff's garden, and that it was necessary to show special damage. And in *Fay v. Prentice* (b), where the plaintiff complained of a projecting cornice, Coltman, J., treated the point as an open one.

On the other hand, in *Ellis v. Loftus Iron Co.* (c), where the defendant's horse put his head over the fence separating the plaintiff's land from the defendant's, it was held that such an act amounted to a trespass. And in *Corbett v. Hill* (d), it was held that the right to the vertical column of air above the area of land conveyed by the plaintiff to the defendant in fee *primâ facie* belonged to the latter, as the person seised of the land. The provisions of the Telegraph Act, 1863 (e), are based upon the assumption that there is a right of property in the air space, and in *Wandsworth Board of Works v. United Telephone Co.* (f) Brett, M.R., and Bowen, L.J., seem to have adopted that view, although it became unnecessary to decide the point. It has, however, been decided by the Court of Appeal in *Finchley Electric Light Co. v. Finchley Urban District Council* (g) that an urban authority in whom the streets are vested under s. 149 of the Public Health Act, 1875, cannot, by reason of the fact that the site of the streets was originally conveyed to turnpike trustees, in fee simple, for the purposes of the Turnpike Acts, prevent the carrying of electric wires over such streets at a height greater than that required for the purposes of traffic.

But, even assuming from the particular facts of the case that there is a right of property in the overlying air space, it must still be a matter of some doubt whether under a lease of the surface the possession of the air space will pass, so as to render

(a) (1815) 4 Camp. 219.

(b) (1845) 1 C. B. 828.

(c) (1874) L. R. 10 C. P. 10.

(d) (1870) L. R. 9 Eq. 671.

(e) 26 & 27 Vict. c. 112.

(f) (1884) 13 Q. B. D. pp. 913 and 919.

(g) (1903) 1 Ch. 437.

the lessee the proper person to sue for a trespass upon it. The question has never yet arisen, but possibly the lessor would not be held to assign those portions of the air space which were at a height greater than was necessary for the convenient occupation of the surface. Though, on the other hand, it is, at least, arguable that as a lessor usually demises to his lessee, during the continuance of the lease (in consideration of the payment of the rent and performance of the covenants therein contained) all the rights which he himself possesses in the demised property, the lessee is entitled, by virtue of such demise, to sue a third party who by his action infringes any right inherent in the freeholder of the soil.

Doubts seem at times to have been entertained as to whether the temporary character of an occupation does not prevent it from amounting to possession; thus, it has been said that a lodger has no right of action against a trespasser who enters his room without his permission. Blackburn, J., in *Allan v. Liverpool* (a) says, "A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment, or trespass *quare clausum fregit*, the maintenance of the action depending on the possession." And in *Holywell Union v. Halkyn Drainage Co.* (b) there are *dicta* by Lords Herschell and Davey to the same effect. It seems, however, that the proposition so stated is too broad, and that the question whether a lodger can or cannot bring trespass depends on what is meant by the term lodger. If by the terms of the contract of lodging the lodger is to become an inmate of the house generally and is to occupy such room as the landlord may from time to time assign to him, then no doubt he takes no interest in the land, and his occupation for the time being of any room, even

Temporary possession.

When lodger may bring trespass.

(a) (1874) L. R. 9 Q. B. p. 191. The same judge uses similar language in *Roads v. Trumpington*, (1870) L. R. 6 Q. B. p. 62.
(b) (1895) A. C. pp. 126, 134.

though he may occupy it exclusively, does not give him the possession of it (a). But if by the terms of the contract he is to have not merely a separate room but a *specific* room, then the letting confers an interest in the land and operates as a demise of the room. In the case of *Inman v. Stamp* (b) Lord Ellenborough at *nisi prius* held that an agreement to let furnished lodgings (which must be taken to mean specific rooms) by the week is an agreement for an interest in land within the Statute of Frauds, and this ruling was subsequently followed by the Court of Exchequer in *Edge v. Strafford* (c). But the interest which the person taking the lodgings has must clearly be a corporeal interest, that is to say, a right to possession, for otherwise it would amount to a mere easement, and to its being so regarded there are two objections, first, that it has never been suggested that the letting of furnished lodgings ought to be by deed, and secondly, that the law does not recognise such an interest as that of an easement in gross. Moreover, it is apprehended that a lodger who hires a specific room can not merely bring trespass against a stranger, but can also sue his landlord in trespass if he enters the room at unreasonable times, or remains there longer than is reasonably necessary for the due furtherance of his interests as landlord. In *Lane v. Dixon* (d) a lodger was held entitled to sue his landlord in trespass for breaking and entering his lodging and excluding him from possession. The only question indeed that was expressly argued in that case was whether there was evidence of a breaking and entry; but the question of the sufficiency of the plaintiff's possession was evidently present to the minds of the Court (e). Again, it has been stated that the landlord of specific rooms may distrain the lodger's goods for rent in arrear, though such a right is wholly inconsistent with any other view than that the lodger has a tenancy, and consequently has such a possession as will enable him to bring trespass. Though as regards the latter proposition, viz., the right of a landlord of furnished rooms to distrain upon furniture brought in by his lodger, it was held by Manisty, J., at

(a) *Wright v. Stavert*, (1860) 29 L. J. Q. B. 161.

(b) (1815) 1 Stark. 12.

(c) (1831) 1 C. & J. 391.

(d) (1847) 3 C. B. 776.

(e) See *per* Maule, J., p. 784.

nisi prius in *Dicks v. Cruikshank and Lacoste* (unreported) that such a distress was illegal, upon the ground that in cases of this description there is no actual tenancy, but only a mere hiring, the landlord having no reversion. The accuracy of this decision may, however, be regarded as questionable. In the case of a guest at an inn, the apparent reason why such a guest cannot as a general rule bring trespass for an intrusion into his apartment is that he does not contract for the occupation of a specific room. If, however, he does so contract to become a guest only on the terms of his having a specific room, there seems to be no reason, apart from the decision in *Dicks v. Cruikshank and Lacoste*, referred to above, why he should not be able to bring trespass (a). The question with which Blackburn, J., in the cases above referred to was immediately dealing was one of rateability; and though no doubt lodgers and guests at inns of all descriptions are not rateable, that may be explained on the ground of the practical impossibility of collecting the rates from persons whose residence is so temporary. No one can be rated who cannot bring trespass, but it is submitted that the converse proposition is not true.

Rights of
guest at inn.

In the absence of an intention on the part of the owner to treat the occupier as a tenant, mere occupation of premises by the consent of the owner, although such occupation be exclusive, does not amount to possession; thus, a servant who for the better discharge of his duties is allowed to have the exclusive occupation of a house cannot bring trespass in respect of it, for the very purpose for which the occupation is in such case given necessarily excludes the idea of any intention to demise (b).

Servants.

Whether public bodies authorised by commission or statute to construct and from time to time repair public works, or to exercise the control and regulate the repair of public highways, acquire thereby any interest in the soil of such works or highways, so as to entitle them to sue in a civil action a trespasser doing a physical injury thereto, is simply a question of intention, which is to be

Public bodies.

(a) See *per* Tindal, C.J., *Dean v. East*, 33; *White v. Bayley*, (1861) 10 *Hogg*, (1834) 10 Bing. p. 351. C. B. N. S. 227.

(b) *Bertie v. Beaumont*, (1812) 16

gathered from the language of the commission or statute, as the case may be (a).

There can be no doubt, however, that a corporation, acting under statutory powers, which commences breaking up a road without first obtaining permission (where such prior consent is required by the enabling statute) is guilty of a trespass (b).

What
invasion of
possession
amounts to
trespass.

“ Every unwarrantable entry on another’s soil the law entitles a trespass by breaking his close ; the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man’s land is in the eye of the law enclosed and set apart from his neighbour’s ; and that either by a visible and material fence, as one field is divided from another by a hedge : or by an ideal invisible boundary, existing only in the contemplation of law, as when one man’s land adjoins to another’s in the same field ” (c). The slightest crossing of the boundary is sufficient, as where the defendant drives a holdfast into the plaintiff’s wall (d) ; but the boundary must be crossed, otherwise the defendant cannot be said to have broken and entered. In one case indeed a defendant was held liable in trespass for the act of his servant in merely placing rubbish against the plaintiff’s wall, but the only point there argued was whether, assuming that the servant’s act amounted to a trespass, the master, who had employed the servant to place the rubbish upon a pathway, but had expressly instructed him not to allow it to touch the wall, was liable for his servant’s act in that form of action ; the question whether the act amounted to a trespass by the servant at all was not discussed (e). In *Dalton v. Angus* (f) Lord Selborne was of opinion that the easement of support to buildings by the adjoining land is a positive easement, a proposition which seems to involve the notion that mere lateral pressure amounts to a trespass ; but all the judges in both Courts below in that case, as well as most of the

(a) Cp. *Duke of Newcastle v. Clark*, (1818) 8 Taunt. 602, with *Corerdale v. Charlton*, (1878) 4 Q. B. D. 104, and *Rolls v. St. George, Southwark*, (1880) 14 Ch. D. 785. See, too, *Hollis v. Goldfinch*, (1823) 1 B. & C. 205 ; and *Finchley Electric Light Co. v. Finchley Urban District Council*, (1903) 1 Ch. 437.

(b) *Bideford Urban Council v. Bide-*

ford Railway, (1903) 68 J. P. 123.

(c) Bl. Com. Vol. 3, p. 209.

(d) *Lawrence v. Obee*, (1815) 1 Stark. 22.

(e) *Gregory v. Piper*, (1829) 9 B. & C. 591 ; and see *Hurdman v. North-Eastern R.*, (1878) 3 C. P. D. 168, C. A.

(f) (1881) 6 App. Cas. p. 793.

judges who gave opinions in the House of Lords, took the opposite view.

To support an action of trespass it is not necessary that there should have been any actual damage; the trifling nature of the trespass is no defence, and the maxim "*De minimis non curat lex*" has no application to the law of trespass.

Trespass lies without damage.

The reason of this seems to be precisely the same as that which renders it unnecessary to prove any damage in an action of trespass to the person (a), namely, that the law, recognising the absolute necessity of preventing breaches of the peace, allows a right of action in such cases, in order to prevent those, the sanctity of whose persons has been violated, from taking the law into their own hands; and since, as has been pointed out above (b), possession implies to some extent personal presence over the whole area of the subject-matter of the possession, all trespass to land will to some extent involve a violation of the sanctity of the person. Whether indeed the action of trespass lies without proof of actual damage in those cases in which the plaintiff had no actual possession at the date of trespass, and in which he only acquires a nominal possession as at such date by virtue of the fiction of relation back (c), seems never to have been decided, but if he does so, then admittedly in such case the reason of the thing altogether fails.

It is no defence to an action of trespass that the trespass was unintentional, provided the physical act of entry was voluntary; as where a person strays off a footpath in the dark, or where, the boundary between the plaintiff's and the defendant's land being ill defined, the defendant in mowing his own grass by mistake mows some of the plaintiff's (d); but if the act be involuntary it is otherwise. "If a man, who is assaulted and in danger of his life, run through the close of another without keeping in a footpath, an action of trespass does not lie" (e). There is, however, one case in which the question of trespass or no trespass does

Intention in general immaterial.

(a) See *Ashby v. White*, (1703) Lord Raym. p. 955. 2 Salk. p. 641.

(c) See above, p. 330.

(b) See p. 327. So the taking of a chattel out of a man's actual possession is an assault upon his person: *per* Powell, J., *Green v. Goddard*, (1704)

(d) *Basely v. Clarkson*, (1682) 3 Lev. 37.

(e) Bac. Ab. Trespass, F.; and see above, p. 9.

depend upon the intention of the defendant, namely, where by an act done off the plaintiff's land he causes some inanimate thing to pass on to it. Thus if one man throws stones, rubbish, or other materials of any kind on the land of another, or if he intentionally causes the stinking water in his yard to penetrate the wall of his neighbour's house and flow into his cellar (a), these are acts of trespass for which he will be responsible without any proof of damage. But if the defendant causes such inanimate things to pass on the plaintiff's land *unintentionally*, and merely as the result of the exercise of his own rights of property, as where he fixes a spout on his roof, whereby the rain-water is discharged on to the plaintiff's land (b), or suffers his privy to be out of repair, whereby the filth flows into his neighbour's cellar (c), or allows the branches of his trees to spread over his boundary (d), or permits sewage to flow on to his land (e), these are acts of nuisance, not trespass; the action in former times must have been laid in case, and the plaintiff must consequently establish the existence of appreciable damage.

Justification
of trespass.

An entry upon the plaintiff's land is not a trespass unless it be unjustifiable. Justification of the entry may be afforded either by operation of law, or by the act of the plaintiff or of his predecessors in title, where the entry is made under a right of easement or of profit à *prendre*, or under a licence.

Where licence
to enter given
by law.

In certain cases the law gives a licence to enter against the consent of the possessor; as where a man enters to execute the process of the law. So too "the law gives authority to enter into a common inn or tavern; so to the lord to distrain; . . . to him in reversion to see if waste be done" (f). It is indeed customary in leases to insert a covenant by the lessee to permit the lessor and his agents to enter at all reasonable times to view the state and condition of the premises, but that covenant seems

(a) *Preston v. Mercer*, (1656) Hardr. 61, as explained by Lord Raymond in *Reynolds v. Clarke*, (1725) Lord Raym. p. 1403. As to percolation of water see *Hurdman v. North-Eastern R.*, (1878) 3 C. P. D. 168.

(b) *Reynolds v. Clarke*, (1725) Lord Raym. 1399.

(c) *Tenant v. Goldwin*, (1704) Lord

Raym. 1089.

(d) *Smith v. Giddy*, (1904) 2 K. 1. 448; *Lemmon v. Webb*, per Lindley L.J., (1894) 3 Ch. p. 11.

(e) *Gibbings v. Hungerford*, (1904) 1 Ir. R. 211, C. A.

(f) *Sir Carpenters' case*, (1610) Rep. p. 146b.

to be superfluous: if the landlord's right of entry for such purposes depended solely on the covenant it would be revocable, which it is not. Again, a licence is given by law to go upon the adjoining land to abate any nuisance (a); and an entry may be justified for the purpose of preventing the spread of fire (b). If the plaintiff wrongfully deposit goods on the defendant's land, the defendant may lawfully go upon the plaintiff's land for the purpose of removing and depositing them there (c). On the same principle, when the plaintiff's cattle trespass on the defendant's land, he may chase them back again into the plaintiff's, and is not compelled to distrain them *damage feasant* (d). A person cannot justify entering the land of another against his will for the purposes of the sport of fox-hunting (e), or of following game started on his own land over the boundary (f). A person may justify trespassing on the plaintiff's land for the purpose of recaption of his goods wrongfully placed there, if the goods were put there by the trespass of the plaintiff himself (g), and probably the same rule would apply if the cause of the deposit were the act of God (h), but not if it cannot be shown how they got there (i), or if it be proved that they were put there by the trespass of a third party (k). Blackstone indeed suggests (l) that where goods have been stolen and deposited by the thief on the land of an innocent third person, the owner of the goods may justify a trespass for the purpose of retaking the goods, and in a case in which it was proposed to plead a justification under those circumstances, Tindal, C.J., thinking the plea to be at least arguable, allowed it to be pleaded (m). One cannot justify entering on the plaintiff's land to retake goods, of which his original possession was lawfully acquired, merely because he converts them, as where a bailee refuses to deliver to the bailor. "If a man take my goods and

(a) See above, p. 158.

(b) *Per* Littleton, J., 9 Edw. IV. 35, pl. 10.

(c) *Ree v. Sheward*, (1837) 2 M. & W. 424.

(d) *Tyrringham's case*, (1584) 4 Rep. 38b.

(e) *Paul v. Summerhayes*, (1878) 4 Q. B. D. 9.

(f) *Deane v. Clayton*, (1817) 7 Taunt. 489.

(g) *Patrick v. Colerick*, (1838) 3 M. & W. 483.

(h) *Nicholson v. Chapman*, and cases mentioned therein, (1793) 2 H. Bl. 254.

(i) *Anthony v. Haney*, (1832) 8 Bing. 186.

(k) Bl. Com. Vol. 3, p. 4.

(l) *Ibid.*, citing *Higgins v. Andrews*, (1619) 2 Rolle, Rep. 55.

(m) *Webb v. Bearan*, (1844) 6 M. & G. 1055, *sed quære?*

bring them on to his own land, I may enter on his land and take my goods, and the entry is lawful, for they came on his land by his own wrong; but it is otherwise if I bail my goods to a man; I cannot justify entering into his house to take my goods, for it was by no wrong that they came there, but by the act of both of us jointly" (a). Nor is any licence given by law to the purchaser of goods, even though sold under an execution or distress, to enter upon the premises of the former owner and take them away (b), though this rule is apparently not of universal application (c). But a tenant who has given up possession of premises cannot justify a subsequent entry for the purpose of removing a chattel which he had left behind him (d); he ought to have removed it while he had a right to the land; and indeed where the incoming tenant, or landlord, as the case may be, does not claim to exercise any right of ownership over the chattel, but merely declines to put himself to the trouble of delivering it, and refuses permission to its owner to enter and take it, it has been doubted whether the latter has any remedy at all (e).

Trespass
ab initio.

Where a person having entered upon land under a licence given by law subsequently abuses that licence he becomes a trespasser *ab initio*, his misconduct relating back so as to make his original entry tortious. The reason given for this rule is that "the law adjudges by the subsequent act *quo animo* or to what intent he entered" (f). Thus, "if he who enters into the inn or tavern doth a trespass, as if he carries away anything; . . . or if he who enters to see waste breaks the house or stays there all night; or if the commoner cuts down a tree; in these and the like cases the law adjudges that he entered for that purpose" (g). So too one who, having lawfully entered for the purpose of levying a distress, subsequently abused his authority, was liable at common law as a trespasser; and this is still the law as regards distress *damage feasant*. But as regards distress

(a) 9 Edw. IV. 35, pl. 10.

(b) *Williams v. Morris*, (1841) 8 M. & W. 488.

(c) *Wood v. Manley*, (1839) 11 A. & E. 34; *Wood v. Leadbitter*, (1845) 13 M. & W. 838 at p. 852.

(d) *Wilde v. Waters*, (1855) 24

L. J. C. P. 193; and see above, p. 244, note (a).

(e) *Per* Maule, J., *ibid.*, p. 195.

(f) *Six Carpenters' case*, (1610) 8 Rep. 146b.

(g) *Ibid.*

for rent and rates, the law on this subject has been altered by a variety of statutes (a).

Of justification arising by the act of the plaintiff or his predecessors in title the commonest case is that of a right of way. Any user of a way in excess of the right of the party using it will render him a trespasser; it is, therefore, material in each case to determine what the extent of the right is (b). Justification under right of way.

Private rights of way may, as regards the purposes for which the way may be used, be either general or limited. Where the right is created by express grant or by Act of Parliament the extent of the right will depend upon the actual terms of the grant or Act as the case may be. If the terms be general, the purposes for which the way may be used will be general. The user will not be restricted to access to the dominant tenement for purposes for which access would be required at the date of the grant (c). Where a right of way is claimed by prescription the general rule is that the extent of the right is to be gathered from the user. But it will not necessarily be limited by the actual user proved. "You must generalise to some extent" (d). Proof of user for one class of purposes may be evidence of a right to use the way for another class of purposes not involving a substantially greater burden on the servient tenement (e). A *terminus a quo* and a *terminus ad quem* are essential to the claim of a private way (f); but so long as the *termini* are clear it seems that the intermediate track need not necessarily be defined (g). Private way.

The right of the public in respect of a highway is limited to the use of it for the purpose of passing and repassing (h), and for ordinary as opposed to extraordinary and excessively weighty traffic (i); if a member of the public use it for any other purpose Public way.

(a) As to which see above, pp. 284-322.

(b) *Harris v. Flower*, (1905) 74 L. J. Ch. 127.

(c) *Watts v. Kelson*, (1870-1) L. R. 6 Ch. p. 169, *per* Romilly, M.R.; *United Land Co. v. Great Eastern R. Co.*, (1875) L. R. 10 Ch. 586; *Newcomen v. Coulson*, (1877) 5 Ch. D. 133; *Dand v. Kingscate*, (1840) 6 M. & W. 174, as explained by Malins, V.-C., (1877) 5 Ch. D. p. 139; *Finch v. Great Western R. Co.*, (1879) 5 Ex. D. 254.

(d) *Per* Parke, B., *Cowling v.*

Higginson, (1838) 4 M. & W. p. 257.

(e) *Ballard v. Dyson*, (1808) 1 Taunt. 279; *per* Bovill, C.J., *Williams v. James*, (1867) L. R. 2 C. P. p. 580; and *per* Mellish, L.J., *Wimbledon, &c. v. Dixon*, (1875) 1 Ch. D. p. 371.

(f) Com. Dig. Chimin., D. 2.

(g) *Per* Mellish, L.J., *Wimbledon, &c., v. Dixon*, (1875) 1 Ch. D. p. 369.

(h) *Doraston v. Payne*, (1795) 2 H. Bl. 527.

(i) *Norfolk County Council v. Green and another*, (1904) 90 L. T. 451; *Ches-*

than that of passing and repassing he will be a trespasser. Thus, where a person while standing on a high road shot at a pheasant it was held that he was rightly convicted of trespassing in pursuit of game (a). So where the defendant was the owner of a grouse moor crossed by a highway the soil of which was vested in him, and the plaintiff on the occasion of a grouse drive went upon the highway for the purpose of interfering with the defendant in the enjoyment of his right of shooting, it was held that the plaintiff was a trespasser and that the defendant's servants were justified in forcibly preventing the plaintiff from continuing such interference (b). And in an American case where the soil of the high road opposite the plaintiff's house was vested in him it was held that a person who stopped upon such portion of the high road for the purpose of slandering the plaintiff was guilty of trespass (c).

Public meetings in thoroughfares.

The public have no right of holding public meetings in a public thoroughfare (d). What will amount to an improper user of a highway is a question of degree (e). Wherever an act done upon a highway is such as to amount to a public nuisance (f), the doer of it, in addition to being liable to an indictment, is liable to the owner of the soil in trespass (g).

With regard to the width over which the public right of passage may extend, "in general where the highway is between two fences all the ground that is between the fences is presumably dedicated as highway unless the nature of the ground or other circumstances rebut that presumption" (h), but where there are no fences at the side of the road there is no presumption that

terfield Rural District Council v. Newton and others, (1904) 1 K. B. 62, C. A.; *Kent County Council v. Folkestone Corporation*, (1905) 1 K. B. 620, C. A. It has been held in a recent case (*The Mayor, &c. of Chichester v. Foster*, (1905) 22 T. L. R. 18), where a traction engine, of unusual weight, in passing along a highway damaged pipes laid thereunder, that the owner of the engine (even in the absence of negligence) was liable for the injury so caused.

(a) *Reg. v. Pratt*, (1855) 4 E. & B. 860.

(b) *Harrison v. Duke of Rutland*, (1893) 1 Q. B. 142.

(c) *Adams v. Rivers*, (1851) 11 Barb. (N.Y.), Rep. 390.

(d) *Ex parte Lewis*, (1888) 21 Q. B. D. 191.

(e) *Gwinnell v. Eumer*, (1875) L. R. 10 C. P. 658; and see *Chase v. London County Council*, (1898) 62 J. P. 184.

(f) As to what constitutes a public nuisance, see *Sheringham Urban District Council v. Holsey*, (1904) 91 L. T. 225.

(g) *Lade v. Shepherd*, (1734) 2 Str. 1004.

(h) *Per Blackburn, J., Easton v. Richmond Highway Board*, (1871) L. R. 7 Q. B. p. 75.

anything beyond the actual road has been dedicated (*a*). There is no general right in the public to pass over the foreshore for the purpose of bathing in the sea (*b*). Nor is there any right in the public at common law to tow on the banks of a navigable river (*c*).

There are also a variety of easements under which a person may have a right to do some act on the land of another other than that of merely passing across it. Thus the owner of a house may have an easement to hang lines across his neighbour's yard for the purpose of drying linen washed in the house (*d*). So the owner of a public-house may have an easement to erect a sign-board on the adjoining land (*e*), or a fascia on the adjoining house (*f*).

Justification
under ease-
ments of
other
descriptions.

Again, as incident to certain easements, such as a right to use a pump or a watercourse, there exists a right to enter upon the land for the purpose of repairing the subject-matter of the easement, "for when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. As if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me" (*g*).

In the case of a nuisance resulting from the defective character of a pipe draining more than one set of premises, it has, however, been held that the repair by the owner of one portion of the land of that part of the pipe which passes through his premises, though conducing to the general advantage, will not entitle him to contribution for his outlay from the other users (*h*).

(*a*) *Attorney-General v. Perry*, (1904) 1 Ir. R. 247, C. A.

(*b*) *Blundell v. Catterall*, (1821) 5 B. & Ald. 268; and see *Brinckman v. Matley*, (1904) 2 Ch. 313, C. A. As to what constitutes an exclusive right to a foreshore, see *Philpot v. Bath*, (1904) 20 T. L. R. 589.

(*c*) *Ball v. Herbert*, (1789) 3 T. R. 253.

(*d*) *Drewell v. Taylor*, (1832) 3 B. & Ad. 735.

(*e*) *Hoare v. Metropolitan Board of Works*, (1874) L. R. 9 Q. B. 296; *Moody v. Steggles*, (1879) 12 Ch. D. 261.

(*f*) *Francis v. Hayward*, (1883) 22 Ch. D. 177, C. A. Where, however, as in these cases, the right claimed consists in the permanent occupation of a portion of the servient soil it may occasionally be difficult to determine whether the case is one of easement or possession, a distinction which becomes material in considering the period of user which will confer a title.

(*g*) *Pomfret v. Ricroft*, (1669) 1 Wm. Saund. p. 322.

(*h*) *Nathan v. Rouse*, (1905) 1 K. B. 527.

Justification
under cus-
tomary rights
of recreation,
&c.

There may exist by virtue of immemorial custom a right in the inhabitants of a particular locality to exercise a variety of easements as in gross; such, for instance, as a right of fetching pot water from a spring (*a*), or a right to dry fishing nets on a person's land (*b*), or a right to use it for purposes of sports and recreation (*c*), and where the sea has gradually receded, land added by accretion takes the character of, and becomes subject to the same customs as, the land to which it is added (*d*). It has sometimes been said that a custom to be valid must be reasonable (*e*), but what meaning is to be attached to that phrase is not clear. At all events as regards customary rights of recreation, the cases seem to show that the indefiniteness of the modes of recreation or of the times of the year at which they are to be enjoyed, is no objection to the validity of the custom, even though the practical effect of such indefiniteness may be to deprive the owner of the soil of all beneficial enjoyment of it (*f*). If indeed that were any objection to the validity of a custom there could be no village greens. The place in which a right to a customary easement is claimed to be exerciseable must be situate within the area within which the persons claiming the right reside. Thus, a custom for the inhabitants of one parish to train horses at a place situate in another parish cannot be supported (*g*).

To what
persons
customary
rights
extend.

Although customs are usually confined to the inhabitants of a particular town, manor, or parish, there is no rule of law requiring that the area of a custom should not be wider in extent provided that district be one known to and defined by the law, such as a hundred. A custom for the inhabitants of two or more adjoining parishes to exercise rights of recreation over land situate in one of them is bad (*h*). How wide the area may be is not clear, but it seems that it may be at least as wide as a county. A custom for all the men of Kent to dry their fishing nets upon a particular

(*a*) *Race v. Ward*, (1855) 4 E. & B. 702.

(*b*) *Per Tindal, C.J., Tyson v. Smith*, (1838) 9 A. & E. p. 421.

(*c*) *Hall v. Nottingham*, (1875) 1 Ex. D. 1.

(*d*) *Mercer v. Denne*, (1904) 2 Ch. 534.

(*e*) Bl. Com. Vol. 1, p. 77.

(*f*) *Abbott v. Weekly*, (1793) 1 Lev.

176; *Mounsey v. Ismay*, (1863) 1 H. & C. 729; *Hall v. Nottingham*, (1875) 1 Ex. D. 1, overruling *Millechamp v. Johnson*, (1746) Willes, 205 n.

(*g*) *Snoerby v. Coleman*, (1867) L. R. 2 Ex. 96. See *Mounsey v. Ismay*, (1863) 1 H. & C. 729, *contra*, but the point was not there taken.

(*h*) *Edwards v. Jenkins*, (1896) 1 Ch.

308.

close adjoining the sea shore has been held good (a). It cannot, however (at all events where, as is usually the case, the right is claimed to be exercised gratuitously), be co-extensive with the whole realm; a custom for the general public to go upon a common such as Newmarket Heath and stay there to witness horse races without payment is void (b). Though it is otherwise where the benefit of a custom is claimed only to be enjoyed on payment. Thus, a custom for all members of the public exercising the trade of a victualler to enter upon a close at certain fairs and erect booths there, paying twopence to the owner, has been held to be good (c).

Although a person having a right to exercise an easement upon the land of another may justify entering upon the land for the purposes of its exercise, it must be borne in mind that an easement, where claimed otherwise than under a custom, can only be lawfully claimed as appurtenant to a tenement (d). A grant of an easement in gross will confer no interest in the soil, but will operate merely as a personal licence. Such a licence, even though it may have been made by deed and for valuable consideration, is revocable at any time by the licensor; the licensee cannot after revocation justify entering upon the land for the purpose of using the privilege; his only remedy against his licensor, where the revocation is wrongful, is upon the contract. Thus, in *Wood v. Leadbitter* (e), it was held that the purchaser of a ticket of admission to the grand stand at a race meeting, who was expelled from the stand by the servants of the owner acting under his orders, had no cause of action against the servants so expelling him, since the purchase of the ticket conferred merely a licence which the owner was at liberty to revoke, the Court in this instance overruling the earlier case of *Taylor v. Waters* (f), in which it had been decided that a silver ticket purporting to

Bare licence
revocable.

Rights of
licensees.

(a) 8 Edw. IV. 18, 19; cited at length by Holroyd, J., in *Blundell v. Catterall*, (1821) 5 B. & Ald. p. 296.

(b) *Earl of Coventry v. Willes*, (1863) 9 L. T. N. S. 384; see, too, *Fitch v. Rawling*, (1795) 2 H. Bl. 394; and *Bourke v. Davis*, (1889) 44 Ch. D. 110.

(c) *Tyson v. Smith*, (1838) 9 A. & E. 406.

(d) See *per* Lord Cairns, *Rangleley v.*

Midland R. Co., (1868) L. R. 3 Ch. p. 310. And see *Hill v. Tupper*, (1863) 2 H. & C. 121. Bramwell, B., in *Nuttall v. Bracewell*, (1866) L. R. 2 Ex. p. 11, suggested the contrary, as also did Mr. Willes in his edition of *Gale on Easements*, 5th ed. p. 13 n. But their view is counter to the current of authority.

(e) (1845) 13 M. & W. 838.

(f) (1816) 7 Taunt. 374.

entitle the holder to admission to a theatre was irrevocable. It is to be observed, however, that in both these cases the licence was one of general admission and not to a particular seat. It is not, therefore, to be inferred that the case of *Wood v. Leadbitter* is any authority for the proposition that a licence to occupy exclusively a specific seat in a race stand or theatre is revocable. On the contrary, by analogy to the rule as to lodgers (as to which see above, p. 339), such licence would seem to amount to a demise for the time of the particular seat. In one case a lessee for a term of years of a box at the opera which the lessors were bound to repair and to which they had access for that purpose at times when there was no performance, was held rateable under a local Act in respect of such box as being the occupier of a tenement (a). But if a letting for a term of years of a box or stall operates as a demise, a letting for a single night ought equally to do so, for the length of the term can make no difference. In *Butler v. Manchester, Sheffield, &c. R. Co.* (b), where a passenger upon the defendants' railway, having been expelled by the defendants' servants without justification (though with no unnecessary violence) from the train in which he was travelling, brought an action for the assault and not for the breach of the contract of carriage, the Court of Appeal held that the doctrine of *Wood v. Leadbitter* did not apply and that the action lay, but upon what ground they distinguished that case does not appear. Moreover, it has been held that although a licence to place chattels on the property of another is revocable at any time, it nevertheless carries with it as necessary incidents the rights to notice of revocation and of reasonable opportunity for removing the chattels (c).

Bare licence
not assign-
able

But a licence, being purely personal, is not assignable, and, therefore, will afford no justification for acts done under it by an assignee even prior to revocation (d).

Meaning of
term "licence
coupled with
an interest."

It has frequently been said that a licence if coupled with an interest is irrevocable, but in none of the judgments where *dicta*

(a) *Reg. v. St. Martin's-in-the-Fields*, (1842) 3 Q. B. 204. See also *Leader v. Moody*, (1875) L. R. 20 Eq. 145.

(b) (1888) 21 Q. B. D. 207.

(c) *Mellor v. Watkins*, (1874) L. R.

9 Q. B. 400.

(d) *Ackroyd v. Smith*, (1850) 10 C. B. 164; and see *British Mutoscope Co. v. Homer*, (1901) 1 Ch. 671.

to that effect occur, does it appear to have been precisely determined what is meant by the term "interest." If the interest to which the licence is annexed is an interest in the land itself, as where the licence is to go upon land for the purpose of taking a profit out of it, or of enjoying an easement as appurtenant to a tenement, then undoubtedly the licence is irrevocable provided it be in due form; but whether it is enough to render a licence irrevocable that it should be annexed to an interest in mere personal property seems doubtful. As, for instance, where a vendor of chattels lying on his premises sells them on the terms that the purchaser shall come and fetch them away, and afterwards revokes the licence to enter the premises; or where an ordinary bill of sale (apart from the provisions of the Bills of Sale Act, 1882 (a)) gives the grantee a power of entry and seizure on default, and the grantor revokes the power; in such cases it is thought that upon principle the licensee could not justify entry after revocation, and that his proper remedy is to sue in detinue. In Viner's Abridgment it is said that "when a man bails goods to another to keep it is not lawful for him, though the doors are open, to enter into the house of the bailee, and to take the goods, but he ought to demand them, and if they are denied to bring writ of detinue and to obtain them by law" (b); and it is difficult to see that an express licence given, and subsequently revoked, could improve his position. The case put by Vaughan, C.J. (c), of a licence to hunt in a man's park and carry away the deer when killed to his own use, which licence, Parke, B., in *Wood v. Leadbitter* (d), says would be irrevocable supposing the grant of the deer to be good, is not in reality a case of a licence coupled with an interest in a chattel, for no property in the deer would pass until it were killed, but seems to amount to nothing less than a grant of a profit à prendre, which would (provided it were in due form, i.e., by deed, necessarily be irrevocable as passing an interest in the soil. In *Wood*

Rule in case
of bailments.

Other
licences.

(a) 45 & 46 Vict. c. 43. Possibly s. 7 of this Act may be construed to give a statutory power of entry for the purposes of seizure in the several events therein specified. The Act gives an implied power of seizure (*Ex parte Official Receiver, In re Morritt*, (1886)

18 Q. B. D. 222).

(b) Trespass, H. a 2, 12. See, too, 9 Edw. IV. 35, pl. 10.

(c) *Thomas v. Sorrell*, (1674) Vaughan, p. 351.

(d) (1845) 13 M. & W. p. 845.

v. Manley (a), where the plaintiff sold a rick of hay then standing on his close to the defendant, with the condition that it might remain there up to Lady Day, and that until that date the defendant might enter the close as often as occasion required for the purpose of removing portions of the stack, it was held that such licence could not be revoked, and that the defendant could justify entry against the plaintiff's will. But that case may be explained on the ground that the licence in fact operated as a demise till Lady Day of the spot of ground on which the stack stood (*b*), to which a right of way across the close would be annexed by law as an easement of necessity, so that the express licence was in fact superfluous. The better opinion seems to be that the revocation of a licence to go upon land is inoperative only where an express grant of it is superfluous; where, that is to say, the licence would by operation of law be impliedly annexed to the grant of the interest to which by the terms of the grant it is expressly annexed; and that apparently can only be where the interest is an interest in land (*c*).

When
reversioner
may sue for
trespass.

Although, in general, the only person who can sue for a trespass is the person who was in possession, actual or constructive, at the time of the trespass committed, yet where the trespass causes a permanent injury to the land affecting the value of the inheritance, a person who is entitled in reversion may sue for the injury to his interest, and he may do so at once without waiting until his future estate falls into possession. Thus a reversioner may sue for cutting down timber trees, or destroying a building, or cutting and carrying away turf, or any similar act involving a partial destruction of the freehold. But for a bare trespass, even though committed under a claim of a right of way, and therefore presumably intended to be indefinitely repeated, and intended to furnish evidence against him, the reversioner cannot sue (*d*).

(a) (1839) 11 A. & E. 34.

(b) See on this subject Lord St. Leonards' criticism of *Wood v. Lake*, ((1751) Sayer, 3), in Sugd. V. & P., 14th ed., p. 124, where he suggests that there is no distinction between an exclusive licence and a demise.

(c) In *Williams v. Morris*, (1841) 8

M. & W. p. 493, Parke, B., says, "It certainly strikes me as a very strong proposition to say that such a licence (i.e. to go on land) can be irrevocable unless it amount to an interest in land, which must, therefore, be conveyed by deed."

(d) *Baxter v. Taylor*, (1832) 4 B. &

In an action of trespass to land the measure of damages to which the plaintiff will be entitled will vary according as the trespass belongs to one or other of the three following classes:—

First, the trespass may consist of a mere entry, a user of the soil by passing over it without doing any damage. In such case the damages recoverable will, as a general rule, in the absence of matter of aggravation, be nominal only. There is no case to be found in the books in which a trespasser having tortiously used an easement above ground, such as a way, has been made to pay compensation upon the basis of the benefit which has thereby accrued to himself (*a*). A claim for compensation on such basis cannot be made under the head of an account of profits, for the benefit arising from the use of an easement, even though it involve the saving of expense to the trespasser, is not a profit in that sense of the term (*b*). There is no substantial analogy between such a case and that of an infringement of a patent or copyright, in which cases the allowance of an account of profits, though nominally resting upon the artificial rule that the plaintiff may waive the tort and sue for money had and received, is, in substance, nothing more than a rough mode of arriving at a calculation of the damage that the plaintiff has suffered, the profit and the damage being presumably proportional to one another.

Measure of damages in trespass.

Trespass productive of benefit to defendant without damage to plaintiff.

And to this rule, that an account of profits cannot be claimed in respect of the tortious user of an easement where no damage has been done thereby, it is apprehended that the case of such user in mines underground forms no exception (*c*). Thus for the tortious user of passages in a mine which had been worked out and abandoned, the damages would presumably be merely nominal.

So where the plaintiff owned a plot of ground so small that he

Ad. 72; *Mayfair Property Co. v. Johnston*, (1894) 1 Ch. 508. As to when reversioner may sue for a nuisance, see below, p. 413, *sqq.*

(*a*) Nor can such compensation be claimed under the head of use and occupation, except under circumstances under which a contract to pay for the user can reasonably be implied; and no implication of such a contract can be

made where the plaintiff was ignorant of the existence of the user (*Churchward v. Ford*, (1857) 2 H. & N. 446).

(*b*) See judgment of Bowen, L.J., *Phillips v. Homfray*, (1883) 24 Ch. D. p. 461.

(*c*) *Powell v. Aiken*, (1858) 4 K. & J. 343. See minute of decree where compensation by way of wayleave was not allowed.

could not profitably have worked the underlying coal himself, and the defendants wrongfully worked the plaintiff's coal and subsequently carried other coal over the ways which they had made under the plaintiff's land, Lord Hatherley was of opinion that the plaintiff was entitled only to the value of the coal wrongfully worked, and not to any compensation by way of wayleave in respect of the carriage of the other coal over his land (a).

Physical
disturbance
of the soil.

Secondly, the trespass may involve, in addition to the entry, an actual physical disturbance of the soil, as where a roadway is cut up by constant user of it, or a bank is dug away. In such cases, if the nature of the damage is such that an ordinarily prudent person having no one to look to for damages would restore the soil to its former condition, as in the case of the roadway put above, the measure of the damage will be the cost of restoration; but if the damage is such that no prudent person would restore it at his own expense, the measure of the damages is the difference in value of the land in the market before and after the injury was committed, and not the expense of restoration (b). If it were otherwise "it would follow that a party who has let the sea in upon the land of another, the land itself being worth only 20*l.*, would have to pay by way of damages the expense of excluding it again by extensive engineering operations" (c). But this rule as to the measure of damages in trespass cannot be considered as of universal application, punitive damages having been sometimes awarded. Thus in the recent case of *Davis v. Bromley Urban Council* (d) (in which the defendant council wrongfully entered upon the plaintiff's land, and demolished a wall he was erecting thereon) it was held by the Court of Appeal that the measure of damages was not necessarily confined to the actual pecuniary loss sustained by the plaintiff, but might also include compensation for matters of aggravation. In the case of a tortious user of an easement which has been productive of damage to the soil, as for instance, where the owner of two portions of a coal-field has wrongfully, and to save himself expense, carried his coal from one portion to the other over the underground

(a) *Livingstone v. Rawyards Coal Co.*,
(1880) 5 App. Cas. p. 38.

(b) *Jones v. Goody*, (1841) 8 M. &
W. 146.

(c) *Per Alderson, B.*, *ibid.*, p. 147.

(d) *Davis v. Bromley Urban Council*.
(1903) 67 J. P. 275.

passages of an intervening mine of the plaintiff, and in so doing has damaged the passages and thereby increased the plaintiff's difficulty in getting his own coal, the Court has sometimes, by way of compensation for the damage, decreed an inquiry into the sum which the defendant would presumably have been willing to pay for the right to enjoy the easement (a) proceeding apparently upon the assumption that the benefit accruing to the defendant from the user is proportional to the damage caused thereby to the plaintiff (b).

In the case of *Whitwham v. Westminster Brymbo Coal Co.* (c) (in which the defendants had committed trespass by tipping spoil from their colliery on the land of the plaintiff) it was held by the Court of Appeal that in estimating the measure of damages the amount of the depreciation in value of that portion of the adjacent property not taken by the wrongdoers must be added to the value of the land actually appropriated by them, the criterion in assessing the worth of the latter being its value to the wrongdoers for the particular purpose for which it was used.

Damages
for loss of
amenity.

Again where land was compulsorily taken under the Defence Acts (d) for the erection of a fort, it was held that the owner was entitled to compensation for loss of amenity to his adjoining lands arising from the natural and ordinary use of the lands taken for the purpose of a fortification and the firing of guns placed thereon (e). But, on the other hand, it has been held a tenant has no right to compensation where, after notice to treat under the Lands Clauses Consolidation Act, but before completion of the agreement (which contained a clause stating that the purchase-money included compensation for all injurious affection) the landowner demised a portion of the lands comprised in the notice (f). Where, however, the action of the authority or corporation possessing, for certain purposes,

(a) *Hilton v. Woods*, (1867) L. R. 4 Eq. 432. And see minute of decree in *Jegon v. Virian*, (1871) L. R. 6 Ch. p. 762; see, too, *Whitwham v. Westminster Brymbo Coal & Coke Co.*, (1896) 1 Ch. 894.

(b) Per Lord Hatherley, *Jegon v. Virian*, (1871) L. R. 6 Ch. p. 758; and *Phillips v. Homfray*, (1871) L. R. 6 Ch. p. 780.

(c) (1896) 2 Ch. 538.

(d) 5 & 6 Vict. c. 94, s. 19; 54 & 55 Vict. c. 54, s. 11.

(e) *Blundell v. The King*, (1905) 1 K. B. 516.

(f) *Mercer v. Liverpool, St. Helen's & South Lancashire R. Co.*, (1904) A. C. 461; and see *Cardwell v. Midland R. Co.*, (1904) 21 T. L. R. 22.

compulsory powers of acquisition is *ultra vires* of those powers, the notice to treat is invalid (a).

Severance
and removal
of portions of
the soil.

Thirdly, the trespass may involve the severing and carrying away of things attached to the soil or of portions of the soil itself. In respect of this class of injury the old common law rule was that the plaintiff might at his option sue either in trespass for the damage to the land, or in trover for the value of the things severed in their character of chattels. Where the things severed were of a higher value before severance than after, the plaintiff would, of course, elect to sue in trespass, and in such action he was entitled to recover the diminution in the value of the land; thus, in trespass for taking fixtures he could recover their value as fixtures (b), though if he made the mistake of suing in trover he could only recover their lower value as chattels (c). So, too, if a trespasser cuts down and removes ornamental timber, the owner may in an action of trespass recover the value of the trees when standing.

So long as the plaintiff's option of suing in trespass or trover was confined to cases where the thing severed was of a higher value before severance than after, the plaintiff could not by the exercise of such option recover more than the actual damage that he had suffered. But when the option came to be applied to cases where the thing severed acquired a higher value by reason of the severance a difficulty arose.

Wrongful
working of
coal.

In *Martin v. Porter* (d), which was an action of trespass for wrongfully working coal, Parke, B., said that had the action been in trover the plaintiff would have been entitled to the value of the coal as a chattel at the pit's mouth or on the canal bank, or wherever he found it, without any deduction whatever (e). But in *Wood v. Morewood* (f), where the plaintiff sued in trover for working and removing his coal, the same judge abandoned the notion that the plaintiff by suing in one form of action rather than the other could increase the damages, and treated trespass and trover as standing on the same footing; and further, whereas

(a) *Batton & Joyner v. The School Board of London*, (1903) 20 T. L. R. 22. K. 540.

(b) *Thompson v. Pettitt*, (1847) 10 Q. B. 101.

(c) *Clarke v. Holford*, (1848) 2 C. &

(d) (1839) 5 M. & W. 351.

(e) S. C. p. 352.

(f) (1841) 3 Q. B. 440, n.

in the earlier case of *Martin v. Porter* (a) it was held, somewhat inconsistently with principle, that the plaintiff was entitled to recover in trespass the value of the coal at the time when it first became a chattel at the pit's bottom without any deduction for the cost of severance, and thereby to recover compensation in excess of his actual damage; in the latter case of *Wood v. Morewood* (b), there was introduced into that rule the qualification that if the defendant was not guilty of any fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, the plaintiff could only recover the fair value of the minerals, as if the seam had been purchased from him by the defendant. The rule so qualified was adopted by the Equity Courts (c), and is now the recognised rule upon the subject (d). In cases coming within this qualification the plaintiff recovers the amount of his damage and no more, namely, the difference in the value of the soil before and after the abstraction of the minerals. Where, however, the defendant has worked the minerals fraudulently, that is to say, wilfully and without any belief of title, or where he has worked them negligently, the penal rule laid down by the Court in *Martin v. Porter* apparently still obtains (e). At what point the dividing-line between negligence and inadvertence is to be drawn, or in what the difference (if any) between them consists, seems never to have been decided.

It may be convenient to mention that where on different dates separate demises of different minerals were granted to two lessees—the rights of the earlier of the two were upheld by the Court, and an injunction granted against the later (f).

It is apprehended that the measure of damages applicable to the tortious taking of coal and other minerals is equally applicable to the taking of other things which are increased in value by severance from the freehold, such as ripe crops or timber ready for cutting, but the point has never been decided.

(a) *Supra*, p. 358.

(b) *Supra*, p. 358.

(c) *Jegon v. Vivian*, (1871) L. R. 6 Ch. 742. Minutes of decree, p. 762.

(d) *Taylor v. Mostyn*, (1886) 33 Ch. D. 226; *Livingstone v. Rawyards Coal Co.*, (1880) 5 App. Cas. 25. And see *Peruvian Guano Co. v. Dreyfus Brothers & Co.*,

(1892) A. C. pp. 175–6.

(e) *Trotter v. Maclean*, (1879) 13 Ch. D. 574; *Taylor v. Mostyn*, (1886) *supra*.

(f) *Shawrigg Fire Clay and Enamelling Co. v. Larkhall Collieries*, (1903) F. 1131, Ct. of Sess.

Limitation
for bringing
trespass.

In general and subject to the exceptions for disabilities mentioned above (a), all actions of trespass *quare clausum fregit* must be brought within six years next after the cause of action arose (b).

Ejectment.

In an action for the recovery of possession of land the plaintiff is put to proof of his title, for the defendant by virtue of his bare possession has a good title as against all who cannot show a better (c). Proof that the plaintiff was in possession before the defendant, no matter for how short a time, is *prima facie* evidence of his having title, for such prior possession raises a presumption that he was seised in fee; but though such presumption cannot be rebutted merely by showing that the plaintiff did not derive his possession from any person who had title (d), the weight of authority is in favour of the view that it may be rebutted by showing that the title is in fact in a third person; to an action of ejectment *jus tertii* is a good defence (e). The cases of *Doe d. Carter v. Barnard* (f), *Brest v. Lever* (g), *Nagle v. Shea* (h), and the judgment of Mellor, J., in *Asher v. Whitlock* (i), are all direct authorities to that effect, and the case of *Doe d. Crisp v. Barber* (k) also seems to have proceeded upon the assumption that such is the law. Apparently the only authorities which are to be found the other way are the following:—In the headnote to the case of *Allen v. Rivington* (l) it is said, “In ejectment, if it appear by the record of a special verdict that the plaintiff has a priority of possession, and no title is found for the defendant, the plaintiff shall have judgment.” But Serjeant Williams, in his note to Saunders’ report of that case, dismisses it with the curt criticism that it “is evidently in direct contradiction of the well-established rule that the plaintiff in ejectment must recover by the strength of his own title, without any regard to the weakness of the defendant’s.” Moreover, the wide proposition contained in that headnote is not borne

In ejectment
jus tertii is a
defence.

(a) p. 176.

(b) 21 Jac. I. c. 16, s. 3.

(c) See above, p. 327.

(d) *Doe d. Smith v. Webber*, (1834) 1 A. & E. 119; *Doe d. Hughes v. Dye-ball*, (1829) M. & M. 346; *Allen v. Rivington*, (1671) 2 Wms. Saund. 111. In none of these cases did the question of *jus tertii* arise.

(e) Whether this is the more convenient or more desirable doctrine is another question.

(f) (1849) 13 Q. B. 945.

(g) (1841) 7 M. & W. 593.

(h) (1874) Ir. Rep. 8 C. L. 224.

(i) (1865) L. R. 1 Q. B. p. 6.

(k) (1788) 2 T. R. 749.

(l) (1671) 2 Wms. Saund. 111.

out by the facts of the case, for it did not appear who the true owner was. In *Darison v. Gent* (a) the Court of Exchequer did indeed directly decide that *jus tertii* could not be set up as an answer to an action of ejectment. But the point had never been argued by counsel, the defendant's case having been directed to a wholly different point. Moreover, that case was expressly dissented from by the Irish Court in the subsequent case of *Nagle v. Shea*. In *Asher v. Whitlock* (b), Cockburn, C.J., also took the view that disseisor's title was good against all but the disseisee, and that a defendant in ejectment could not rely on the *jus tertii*; but he went upon the authority of *Doe v. Dyeball* (c), in which case it did not appear who the true owner was.

Though in general *jus tertii* is a good defence in an action of ejectment, there are cases in which a defendant will be estopped from setting it up. Just as in an action of trover by a bailor of goods against his bailee the bailee is estopped from disputing his bailor's title, so in the case of ejectment by landlord against tenant the tenant is estopped from disputing his landlord's title. There is, however, this distinction between the two cases, that, whereas, with the sole exception of a plea of eviction by title paramount (d), the bailee is equally estopped from showing that his bailor had no title at the date of the bailment, or that his bailor's title has determined since that date (e), the tenant of land is always entitled to show that his landlord's title has expired in the interval, either by reason of his having assigned his reversion, or by reason of the landlord having been himself a tenant under a limited interest which has since determined (f). The tenant need not allege that he is defending by the authority of the true owner. This distinction, which cannot be regarded as satisfactory, is merely an illustration of the rule stated on the preceding page that *jus tertii* is a good defence in ejectment, a rule which has no counterpart in the case of an action of trover by a prior possessor. It may be that the authorities on this subject require

Estoppel
between
landlord and
tenant.

(a) (1857) 1 H. & N. 744.

(b) (1865) L. R. 1 Q. B. p. 5.

(c) (1829) M. & M. 346.

(d) *Ross v. Edwards*, (1895) 73 L. T. 100 P. C.; *Biddle v. Bond*, (1865) 6 B. & S. 225.

(e) *Rogers v. Lambert*, (1891) 1 Q. B. 318.

(f) See the cases collected in the notes to *Walton v. Waterhouse*, (1672) 2 Wms. Saund. 7th ed. 826 (1).

reconsideration. It has been held that if a party claiming a right to demised premises under a title paramount to that of the lessor compels the tenant to attorn to him under a threat of eviction, the tenant though continuing in possession may dispute his lessor's title, for that the compulsory attornment operates as a constructive eviction (a). This proposition, however, has been denied (b).

It was at one time thought that a lessee for years could not bring an action to recover possession of the demised premises until after entry, on the ground that until entry his title was not complete (c). This, however, is not so. "The interest and legal right of possession, where the term is to commence immediately and not *in futuro*, vests in the lessee before entry" (d).

Mesne profits.

In an action for the recovery of possession of land (e), the plaintiff may in addition recover as against the original party who wrongfully entered into possession, or as against the heir or devisee of such party, damages for the value of the mesne profits which the plaintiff has lost by reason of such wrongful possession.

From whom recoverable.

Whether, however, he can recover such mesne profits from a party wrongfully in possession, who has disseised the original disseisor or has entered under a grant from the original disseisor as lessee for years or as a purchaser in fee, seems doubtful. In *Holcomb v. Rawlyns* (f) it was held that in both cases, both against the second disseisor and against the grantee of the first disseisor, mesne profits could be recovered by the owner after re-entry. There are, however, cases to be found in the Year Books the other way, which cases were approved in *Liford's Case* (g). The supposed objection to holding such parties liable for mesne profits to the true owner is that they would thereby be charged twice over, the presumption being that they have

(a) *Mayor of Poole v. Whitt*, (1846) 15 M. & W. 571.

(b) *Delaney v. Fox*, (1857) 2 C. B. N. S. 768.

(c) Bac. Ab. Ejectment, B.

(d) *Per* Pattison, J., *Ryan v. Clark*, (1849) 14 Q. B. p. 73; *Harrison v. Blackburn*, (1864) 17 C. N. S. 678.

(e) Rules of Supreme Court, Ord. 18, r. 2. As to which, see above, p. 332,

note (c).

(f) (1595) Cro. Eliz. 540.

(g) (1614) 11 Rep. 51 a. The resolution there on this point was unnecessary to the decision, and the earlier case of *Holcomb v. Rawlyns* (1595) was not cited. In *Barnett v. Guildford*, (1835) 11 Exch. p. 30, however, Parke, B., *obiter*, approved the resolution in *Liford's case*.

already paid the original disseisor. This objection, however, seems very unsatisfactory, for if valid it ought equally to be an answer to the action of ejectment itself; while, with regard to the case of the second disseisor, the presumption that he has paid the first disseisor is in the highest degree artificial. The probability is that at the present day, whenever such a case arises for decision, the Court will prefer to follow the decision in *Holcomb v. Rawlyns*.

Under the head of mesne profits are included compensation for the value of the use and occupation of the premises, whether occupied by the defendant himself or by a tenant holding under him (a), and also any damage which has been caused to the premises themselves (b), for the term "mesne profits" is not confined to the profits which have accrued to the defendant, but extends to all loss that the plaintiff has sustained (c). In considering the value of the use and occupation the net annual value must be taken.

What they include.

Under the old law of limitation, which was in force down to 1833, not only did the possession of another person not operate as a dispossession of the owner if such possession was not adverse in fact to the owner's title, but neither did it operate as such a dispossession if, though adverse in fact, it was what was termed "non-adverse," under which description were included many kinds of possession which were wholly inconsistent with the title of the owner (d). Of such non-adverse possession the old doctrine of *possessio fratris* was an illustration; if upon the death of an owner in fee intestate, in the absence of the real heir, the party next entitled as heir entered and enjoyed the land, his possession was deemed non-adverse, and though continued for the statutory period did not bar the owner. By the statute of Will. IV., however, the whole doctrine of non-adverse possession was swept away (e), and the only question now, in cases which the party has entered *without title*, is whether there has been an exclusive

Statutes of Limitation.

In general the statute will not run unless the possession is adverse.

(a) *Doe v. Harlow*, (1840) 12 A. & E. 40.

(b) *Dunn v. Large*, (1783) 3 Doug. 335.

(c) *Goodtitle v. Tombs*, (1770) 3 Wils. p. 121.

(d) The terms "adverse" and "non-adverse" were a cross division, not being mutually exclusive.

(e) *Per* Lord Denman, *Doe d. Nepean v. Knight*, (1837) M. & W., p. 911.

occupation of the land by him as owner ; though in two classes of cases in which the party has entered *with title*, namely, those of tenancies at will and tenancies from year to year, the statute of Will. IV., not content with abolishing the fictitious doctrine of non-adverse possession, went a step further and did away with the requirement that the possession should be adverse in fact. A tenant at will or tenant from year to year who remains in possession during the statutory period without payment of rent now acquires a title as against his lessor notwithstanding that his lessor may have entered upon the property to do repairs, or that he may have from time to time during the tenancy made verbal admissions that the occupation was permissive (a).

Exceptions.

When the statute begins to run.

The following are the principal provisions of that statute as amended by the Real Property Limitation Act, 1874. No person is to make any entry or bring any action to recover any land but within twelve years next after the time at which the right to make such entry or to bring such action shall have first accrued to him or to some person through whom he claims (b), and at the determination of the period, so limited by the Act to any person for making an entry or bringing an action, the right and title of such person is to be extinguished (c). Where the person claiming the land, or his predecessor in title, shall have been in possession and shall have been dispossessed or have discontinued possession, the statute is to run from the time of such dispossession or discontinuance of possession (d). The difference between dispossession and discontinuance of possession seems to be that the one is where a person comes in and drives out the other from possession, the other is where the person in possession goes out and is followed into possession by another (e). If the person entitled has been in possession, mere non-user by him will not amount to a discontinuance of possession. To constitute such a discontinuance there must not only be a dereliction by the owner but actual enjoyment by another person (f). But where the person

(a) *Lynes v. Snaitth*, (1899) 1 Q. B. 486. But see *Archbold v. Scully*, (1861) 9 H. L. C. 360.

(b) 37 & 38 Vict. c. 57, s. 1.

(c) 3 & 4 Will. IV. c. 27, s. 34.

(d) s. 3.

(e) See *per Fry, J., Rains v. Buxton*,

(1880) 14 Ch. D. p. 539. And see *Leigh v. Jack*, (1879) 5 Ex. D. 264. As to what constitutes an exclusion of rightful owner see *Philpot v. Bath*, (1904) 20 T. L. R. 589.

(f) *Per Blackburn, C.J., McDonnell v. McKinty*, (1847) 10 Ir. L. R. p. 526.

entitled has never been in possession, as where he derives his title as heir or devisee of a person who died seised, or as alienee of a former possessor, and has neglected to enter, mere non-user for the statutory period will extinguish his title, even though no one else was in possession. The statute in such cases runs from the date of his predecessor's death or from that of the alienation, as the case may be (a). Thus if a person becomes entitled to a field as devisee and never enters, and the field remains unoccupied for eleven years, and then a trespasser occupies for a year, the owner's right will be barred, and the trespasser will have a good title. Though in such case the squatter's enjoyment of the land is qualified by any restrictive covenants as to user that were obligatory on the earlier possessors of the property, and constructive notice of such covenants will be implied (b). In some of the cases there are suggestions that the statute will not run unless there be some person in whose favour or for whose protection it will operate (c). But there does not appear to be anything in the Act itself to support that view. On the contrary, s. 34 read together with s. 8 seems expressly to say that in certain cases the owner's title may be extinguished without any title being vested in any one else. The *dictum* of Parke, B., in *Smith v. Lloyd* (d) that "there must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute," was intended to be confined to a case in which the owner had once been in possession and had ceased to occupy, and was not intended to apply to a case where the owner

In that case ejectment was brought for mines, the ownership of which had many years before been severed from that of the surface, and upon which mines the plaintiffs had never specifically entered. The case proceeded entirely upon the question whether there had been discontinuance of possession; it assumed that the plaintiffs had been in possession of the mines, which indeed was the fact, as they had always been in actual possession of other land in the same county, and under the same title, so that specific entry upon the mines themselves was unnecessary to give

them possession of them. Had the plaintiffs not had possession of other land in the same county, and under the same title, the decision would presumably have been the other way. See next page, note (a).

(a) 3 & 4 Will. IV. c. 27, s. 3.

(b) *Nisbet & Potts Contract, In re*, (1905) 1 Ch. 391.

(c) *Per* Blackburn, C.J., *McDonnell v. McKinty*, (1847) 10 Ir. L. R. 514; *per* Kay, L.J., *Willis v. Earl Howe*, (1893) 2 Ch. p. 554.

(d) (1854) 9 Exch, 562, 572.

had never been in possession at all (a). Mere formal entry upon the land by a disseised owner without expulsion of the disseisor will not revest the possession in the owner so as to prevent the statute from running against him (b).

Successive
independent
trespassers.

It seems to have been treated in the old Digests (c) as well-settled law that an owner who has been disseised could not before re-entry sue for any trespass committed after the date of the disseisin, because at the time of such trespass he was necessarily out of possession. He was in the same position as an heir or devisee who had never been in possession (d). Consequently from the date of his disseisin the period of limitation would continue to run against him until re-entry made or action of ejectment brought; and the fact that the disseisor had gone out of possession in the interval would apparently make no difference. If, therefore, this view is still to be regarded as law, in cases in which land has successively been occupied by a series of trespassers, it is, for the purpose of determining whether the owner is barred, obviously unnecessary to inquire whether such trespassers claimed through one another or whether their possession was continuous. However independent or however discontinuous their possession may have been, after twelve years from the date of the first disseisin the title of the owner would be extinguished (e).

There is indeed, modern authority to the contrary. In *Trustees, Executors, & Agency Co. v. Short* (f), more than forty years before action of ejectment brought, a trespasser had entered into occupation of the plaintiff's land, but, before he had acquired a statutory

(a) This seems clear from the actual decision upon the pleadings, which were as follows:—Action for trespass to a close. Plea that defendant's predecessor in title, 130 years previously, had owned the surface and the minerals, and had conveyed the surface to the plaintiff's predecessor, reserving the minerals, with a right of access to them through the close. Replication that no entry had been made by the defendant within twenty years after the right of entry accrued. Rejoinder that the defendants had not been dispossessed or discontinued possession. This rejoinder was

held bad, on the ground that it did not negative the right of entry having accrued on the death of another (which having regard to the date of the reservation of the minerals, must have been the case), and did not aver any entry.

(b) 3 & 4 Will. IV. c. 27, s. 10.

(c) Rolle, Abr. Trespass, K. 1; Com. Dig. Trespass (B. 2); Co. Lit. 257(d), sect. 430.

(d) See above, p. 365.

(e) *Doe d. Goody v. Carter*, (1847) 9 Q. B. 863.

(f) (1888) 13 App. Cas. 793, P. C.

title, had abandoned it. The plaintiffs never re-entered, and the land remained unoccupied till less than twelve years before action, when the defendants entered into possession. It was held by the Privy Council that the title of the owner was not barred, and it was there laid down that "if a person enters upon the land of another, and then, without having acquired a title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot enter upon himself. There is no positive enactment, nor is there any principle of law which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose." And in *Willis v. Earl Howe* (a), Kay, L.J., while of opinion that a series of independent trespassers occupying in the aggregate for the statutory period would bar the title of the owner if their possession were continuous, seems to have conceded that if there was a break in the continuity by reason of an interval of vacant possession, as in the case last mentioned, the owner would not be barred. In neither of those cases was any earlier authority cited in support of the proposition so laid down, nor does there appear to be any such authority, while the proposition itself seems directly at variance with the foundation of the whole doctrine of trespass by relation (b). But if the view of the Privy Council be right, in a case of enjoyment had by successive independent trespassers, the true owner would be barred only in the event of each succeeding trespasser disseising his immediate predecessor; for if any one of the series went out voluntarily there would necessarily be some interval of vacant possession before the successor came in, and the length of the interval could make no difference.

But assuming that the successive occupation by a series of independent trespassers occupying in the aggregate more than

(a) (1893) 2 Ch. 545.

(b) See above, p. 330. If there is no necessity for entry where the land is vacant, it is difficult to see why s. 3 of

the Act of 1833 provided that as between heir and abator the statute should run not from the abatement but from the date of the ancestor's death.

twelve years will suffice to bar the title of the true owner, the question remains which of those trespassers is at the expiry of the period entitled to the possession of the land? The true answer seems to be that suggested by Romilly, M.R., in *Dixon v. Gayfere* (a), that the person in actual possession at that date is entitled to retain it, not because he has got a statutory title, but because he is in possession and no one else has got any title at all. It has been said that "the effect of the Act is to make a parliamentary conveyance of the land to the person in possession after that period of (twelve) years has elapsed" (b), but that proposition is to be understood as limited to cases in which the person so in possession has by himself or his privies been in possession during the whole period, in accordance with the view taken by the Court in *Doe d. Carter v. Barnard* (c). It is one thing to say that the owner's title is extinguished; it is another thing to say that his title has been transferred to any one else. It seems that where the possession during the statutory period has been had by a series of independent trespassers, the one in possession at the end of the period, though entitled to retain that possession so long as he has got it, cannot, if he once allows himself to be dispossessed, bring any action for its recovery (d). On the other hand, it has been suggested that the person entitled to the land is the first of the series of trespassers who has not been out of possession for more than twelve years, and that he is entitled to recover on his prior possession (e). But that view is based upon the assumption that *jus tertii* is no defence to an action of ejectment, whereas the weight of authority is, as stated above (f), the other way. The first trespasser could not, immediately upon his losing possession, have brought an action to recover it, for the title of the true owner, not being barred at that date, would have afforded an answer; and it cannot be that his position would be bettered by reason of a subsequent possession

(a) (1853) 17 Beav. 421.

(b) *Per* Parke, B., *Doe d. Jukes v. Sumner*, (1845) 14 M. & W. p. 42.

(c) (1849) 13 Q. B. 945.

(d) *Doe d. Carter v. Barnard*, (1849) 13 Q. B. 945.

(e) In *Asher v. Whitlock*, (1865) L. R. 1 Q. B. p. 4, Cockburn, C.J., *arguendo*,

said he doubted the correctness of Lord Romilly's *dictum* in *Dixon v. Gayfere*, (1853) 17 Beav. 421. But the case upon which he relied for the contrary does not bear him out, in that case no *tertius* being shown.

(f) See above, p. 360.

had not by himself but by a stranger holding adversely to him.

Possession or receipt of the entirety, or of more than his due share, of the land or of the profits thereof by one of several joint tenants or tenants in common, is to be regarded as *pro tanto* a dispossession of the others (a).

Possession is never to be regarded as the dispossession of another if it can be referred to a lawful title, for no man shall be heard to set up his own wrong. In one case in a marriage settlement copyhold lands of the wife had been settled on the husband in fee in the event of his surviving his wife, but there was no surrender to the uses of the settlement, and the husband having survived her was admitted expressly to hold "pursuant to the uses of the settlement," and being so admitted remained in possession until his death more than twenty years afterwards. On ejectment being brought by the heir-at-law of the wife against one claiming as devisee of the husband, it being proved that by the custom of the manor the husband was entitled to hold by curtesy for his life, it was held that, notwithstanding the express terms of the admission, the husband's possession was to be referred to the custom and not to the settlement, which, there having been no surrender to uses, could have given him no title (b).

When possession is to be regarded as adverse.

An Act which, though amounting to a trespass, is beneficial to the owner, is not necessarily to be regarded as an adverse act, and as constituting a dispossession. Thus it has been held that the clipping of a hedge on both sides from time to time as occasion required by the owner of the adjoining land, did not after the statutory period confer a title to the site of the hedge, on the ground that to keep a person's hedge in repair for him is not an adverse act (c). But, where a railway company erected a post and rail fence as their boundary and planted a hedge inside it at a distance of four feet from the fence; and as the hedge grew up allowed the fence to decay so that the four-foot strip came to be thrown into the adjoining field, it was held that the owner of the

(a) 3 & 4 Will. IV. c. 27, s. 12.

(b) *Doe v. Brightwen*, (1809) 10 East, 583. This case was decided under the old law, but it is equally applicable to the present.

(c) *Searby v. Tottenham R. Co.*, (1868) L. R. 5 Eq. 409. The doubts expressed as to this case by James, L.J., (1879) 13 Ch. D. p. 271 n., do not seem to touch the point for which it is here cited.

field having occupied the strip for twenty years had acquired a statutory title to it, notwithstanding that the company's servants had annually stepped over the hedge on to the four-foot strip for the purpose of clipping the hedge, for that their doing so must be referred to an intention to discharge their duty towards the adjoining owner of keeping the hedge in a proper state of repair, and not to an intention to retain actual possession of the strip (a).

But, on the other hand, it was held by the Court of Appeal in the more recent case of *Littledale v. Liverpool College* (b) that a merely equivocal act of possession, though exercised during a period exceeding twelve years, was not necessarily adverse to the original owner, and consequently did not operate as a statutory transference of title.

Remainder-
man.

In the case of future estates the right accrues at the time when the estate becomes an estate in possession, subject to this, that if the owner of the particular estate was out of possession at the time when his interest determined, then the action shall only be brought within twelve years after the owner of the particular estate ceased to be in possession, or within six years after the future estate falls into possession, whichever period shall be the longer, provided that if under such circumstances the owner of the future estate be once barred, all persons claiming to be entitled to any subsequent estates under any deed, will, or settlement, executed or taking effect after the accrual of the right of action of the owner of the particular estate, shall be barred also (c).

Reversioners.

Where land is let under a lease, though the landlord may under the terms of the lease have a right of entry for any forfeiture or breach of condition, if he does not choose to avail himself of such right and waives the forfeiture, then for the purposes of the statute the right is to be deemed to accrue upon the expiry of the lease (d), and mere non-payment of rent for the whole statutory period will not affect the landlord's title to the reversion; though his right to recover any rent reserved by the lease is limited by

(a) *Norton v. London & North Western R. Co.*, (1879) 13 Ch. D. 268.

(b) (1900) 1 Ch. 19.

(c) 37 & 38 Vict. c. 57, s. 2.

(d) 3 & 4 Will. IV. c. 27, s. 4.

the statute to six years' arrears (a). But if, the rent reserved by the lease being more than forty shillings, the tenant not merely does not pay it to the landlord, but pays it wrongfully to a third person, in such case the statute runs not from the expiry of the lease but from the date of the first wrongful receipt of rent by such third person. Where a remainderman has a right of entry by reason of a forfeiture, omission to take advantage of the forfeiture will not set the statute running (b).

In the case of a tenancy from year to year under a lease not in writing, the statute runs from the end of the first year or from the last receipt of rent, whichever shall last happen (c). But where the tenancy is from year to year under a lease in writing, in the absence of something done by the tenant amounting to a repudiation of the landlord's title, it seems that the statute does not run until the landlord chooses to give a notice to quit (d).

In the case of possession had under an agreement for a lease the statute does not run during the period of the intended term (e).

Where a person is in possession of premises as tenant at will, the right of entry of the landlord shall, if there has been no previous determination of the will, be deemed to accrue at the expiry of one year from the commencement of such tenancy, at which time such tenancy shall be deemed to have been determined (f). If a person be in possession of premises as tenant at will, and the landlord enters and does any act of ownership without the tenant's consent, that determines the tenancy at will, and the occupation of the tenant, if continued, is thereby converted into a tenancy at sufferance (g). If nothing further takes place to give rise to a new tenancy at will, such tenancy at sufferance will coalesce with the earlier tenancy at will, and the statute will run from the expiry of the first year of the tenancy at will or from the date of its determination, whichever was the earliest (h). But if a

Tenancies
at will.

(a) *Archbold v. Scully*, (1861) 9 H. L. C. 360.

(b) 3 & 4 Will. IV. c. 27, s. 4.

(c) s. 8.

(d) But see *Stagg v. Wyatt*, (1838) 2 Jur. 892, as to when a notice to quit is to be presumed.

(e) *Warren v. Murray*, (1894) 2 Q. B. 648.

(f) 3 & 4 Will. IV. c. 27, s. 7.

(g) *Doe v. Turner*, (1840-2) 7 M. & W. 226 ; 9 M. & W. 643.

(h) *Day v. Day*, (1871) L. R. 3 P. C. 751.

new tenancy at will is created the statute runs from the end of the first year of such new tenancy (a). The question whether a new tenancy at will has been created is one for the jury; but very slight evidence will warrant them in so finding (b). If, when a person is in possession as tenant at will, the landlord not merely determines the will, but actually puts the tenant out of possession for ever so short a time, the tenant cannot by wrongfully resuming possession cause his subsequent possession to coalesce with his earlier tenancy at will; the statute will in such case run from the date of resumption of possession (c):

Occupation
by servants.

Where a servant is permitted to occupy gratuitously premises belonging to his master, for the purpose of the more convenient discharge of his duties, he does not thereby acquire any tenancy at will therein, for such occupation is to be treated as the possession of his master and not as an independent possession of his own (d); and this is so even though the servant may by the terms of his employment be permitted to carry on an independent business on the premises (e). Consequently, however long such occupation by the servant may be continued, it will never give him a good title against his master. Thus, where a land-owner built a school-house on his property, and appointed a schoolmaster, giving him a small stipend, but allowing him to charge fees to the scholars, and permitting him to occupy the premises as a school, it was held that, the schoolmaster being in the position of a servant, twenty years' occupation did not give him a good title (f). But to prevent the statute from running in such case there must be actual service during the period of occupation; there must be some duties performed. The mere fact that the person occupying the premises was once a servant of the owner and is pensioned off, will not prevent him from acquiring a title if his occupation is not conditioned by the performance of some duty.

If a tenant at will, not merely verbally admits the title of his lessor, but also pays him rent, that will prevent the statute from

(a) *Locke v. Matthews*, (1863) 13 C. B. N. S. 753.

(b) *Doe v. Turner*, (1840-2) 9 M. & W. 643.

(c) *Randall v. Stevens*, (1853) 9 E. & B. 641.

(d) *Bertie v. Beaumont*, (1812) 16 East, 33.

(e) *White v. Bayley*, (1861) 10 C. B. N. S. 227.

(f) *Lessee of Moore v. Doherty*, (1843) 5 Ir. L. R. 449.

running, for the receipt of rent payable by any tenant from year to year, or other lessee (which latter term would seem to include a tenant at will), is as against such lessee to be deemed to be the receipt of the profits of the land for the purposes of the Act (a).

A tenant who avails himself of the opportunity afforded him by his tenancy to make encroachments upon the adjoining land of third persons, is presumed to have intended to make them for the benefit of his lessor, unless there be circumstances pointing to an intention to take the land for his own benefit exclusively (b). And the assent of the lessor to the making of the enclosure makes no difference (c). The tenant, therefore, in general cannot acquire a statutory title to the subject-matter of the encroachment by possession had during the tenancy; the statute only begins to run in his favour after the tenancy has expired. But the above presumption does not apply unless the relation of landlord and tenant existed at the date of the encroachment made. Moreover one who occupies as his own, land belonging to another, and subsequently becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession but can, whilst he remains tenant, acquire as against his landlord a prescriptive title to the land so occupied by him (d).

Encroach-
ments by
tenants.

The right of entry or action by a mortgagee is barred after twelve years from the date of the last payment of principal or interest (e).

If at the time of the accrual of his right of entry or action the party entitled is under a disability by reason of his being infant, idiot, or lunatic, a further extension of time is allowed of six years from the termination of the disability (f), subject to this that the entry or action must be made or brought within thirty years after the accrual of the right (g). No extension of time, however, is allowed for absence of the party entitled beyond seas (h); and the disability which formerly existed in the case of

Disabilities.

(a) 3 & 4 Will. IV. c. 27, s. 35.

259.

(b) *Doe v. Jones*, (1846) 15 M. & W. 580.

(e) 7 Will. IV. & 1 Vict. c. 28, s. 1.

(f) 37 & 38 Vict. c. 57, s. 3.

(c) *Whitmore v. Humphries*, (1871) L. R. 7 C. P. 1.

(g) s. 5.

(h) s. 4.

(d) *Dixon v. Baty*, (1866) L. R. 1 Ex.

coverture is now removed by the effect of the Married Women's Property Act, 1882 (a).

An acknowledgment in writing of the title of the person entitled to any land or rent, given to him or his agent by the person in possession or receipt of the profits of the land or rent, is to be deemed to be the possession or receipt of the person to whom or to whose agent such acknowledgment shall have been given (b), and the statute is set running afresh from the date of such acknowledgment.

Concealed
fraud.

In every case of a "concealed fraud" the right of a person to sue for the recovery of any land "of which he or any person through whom he claims may have been deprived by such fraud," is to be deemed to accrue at the time when the fraud is, or with reasonable diligence might have been discovered, except as against a *bonâ fide* purchaser for value (c). What is the exact meaning of the expression "concealed fraud" it is not very easy to determine. It is settled that mere ignorance by the owner of his rights is not enough to prevent the statute from running (d); such ignorance must be the result of a fraud on the part of some person or other; but whether the word "concealed" adds anything is doubtful (e). In *Lawrance v. Lord Norreys* (f) Stirling, J., was of opinion that fraudulently obtaining possession of the plaintiff's evidences of title and destroying them was a concealed fraud, but this point was left open by the Court of Appeal (g) and also by the House of Lords (h). In *Vane v. Vane* (i) it was held that if a father brought up his younger son in the belief that his elder illegitimate brother was legitimate, whereby upon the father's death the younger son was induced to allow the elder brother to enter and enjoy the estate, that was a concealed fraud within the rule. Although it was once thought otherwise (k), it is now well settled that the fraud must be the fraud of the person in possession or of his predecessor in title (l):

(a) 45 & 46 Vict. c. 75. See *Lowe* Ch. 550.
v. *Fox*, (1885) 15 Q. B. D. 667.

(b) 3 & 4 Will. IV. c. 27, s. 14.

(c) 3 & 4 Will. IV. c. 27, s. 26.

(d) *Wilks v. Earl Howe*, (1893) 2 Ch. 545; *Thorne v. Heard*, (1895) A. C. 495.

(e) See *per* Lindley, L.J., (1893) 2

(f) (1888) 39 Ch. D. 213.

(g) *Ibid.*

(h) (1888-90) 15 App. Cas. 210.

(i) (1872-3) L. R. 8 Ch. 383.

(k) *Per* James, L.J., *Vane v. Vane*. (1872-3) L. R. 8 Ch. p. 397.

(l) *Willis v. Earl Howe*, (1893) 2 Ch.

the fraud of a stranger is not enough. But it is to be observed that a plaintiff who seeks to bring himself within the exception of concealed fraud must show that by means of such fraud he or some person through whom he claims was "deprived" of the land; and the authorities establish that a person cannot be said to have been deprived by the fraud, if the fraud was subsequent to the wrongful entry which gave him a right to bring ejectment. Fraud, however active, the effect of which is merely to conceal the existence of a cause of action already vested will not suffice (a). The statute having once begun to run, no amount of subsequent fraud will prevent it from continuing to do so.

The owner's ignorance of his right of action may result either from his ignorance of the existence of his title, or from his ignorance of the fact of the other party's enjoyment. Where that enjoyment is underground, as for instance where an adjoining mine-owner by driving levels through his neighbour's coal seam takes possession of the seam (b), or where one digs and occupies a cellar under his neighbour's house, the mere conscious violation of the owner's right itself amounts to fraud (c). It has indeed been said that an underground trespass, even though innocently committed, must be considered to be a concealed fraud (d). This however does not accord with the other authorities. To amount to a fraud within the meaning of the statute the act must be done neither by inadvertence nor under a *bonâ fide* belief of title (e). But the onus of proof in respect of such belief must lie on the party setting it up, for every secret underground trespass is *primâ facie* fraudulent. Where therefore the necessary conditions of wilful and secret trespass on the part of the wrongdoer and ignorance coupled with absence of laches on the part of the aggrieved person are fulfilled, nothing more is

545; *Thorne v. Heard*, (1895) A. C. 495; *McCallum, In re, McCallum v. McCallum*, (1901) 1 Ch. 143.

(a) *Laurance v. Lord Norreys*, (1888-90) 15 App. Cas. 210; *Willis v. Earl Hulse*, (1893) 2 Ch. 545; *Thorne v. Heard*, (1895) A. C. 495.

(b) See above, p. 326.

(c) In *Rains v. Buxton*, (1880) 14 Ch. D. 537, where fraud was negatived, there was a door to the underground cellar

opening into the area, so that the fact of the occupation was patent.

(d) *Per Malins, V.-C., Ecclesiastical Commissioners v. North Eastern R. Co.*, (1877) 4 Ch. D. p. 860. See above, p. 183.

(e) *Trotter v. Maclean*, (1879) 13 Ch. D. 574. These last two cases were decided under the statute of James, limiting the time for bringing trespass, but the principle is the same.

necessary to establish the existence of a concealed fraud which will prevent the running of the Statute of Limitations (a).

Waste.

The subject of injuries to reversionary interests in land caused by an act of trespass on the part of a stranger has already been dealt with above (b). It remains to deal with those injuries to the reversion which are caused by a person in possession of the land under a limited interest, and which are known by the name of waste. Waste has been defined to be "the committing of any spoil or destruction in houses, lands, &c., by tenants, to the damage of the heir, or of him in reversion or remainder" (c). The old writ of waste having been abolished by statute (d), the present common law remedy for such injury is an action on the case. The gist of such action is damage; nominal damages cannot be recovered, nor unless the damage be substantial will the Court interfere by injunction (e). It was formerly thought that any alteration of the tenement amounted to waste even though it had the effect of improving the value instead of diminishing it; thus it was said that "if the tenant build a new house it is waste" (f). But that is no longer the law. It is essential to show that the new building or other act complained of is an injury to the inheritance (g). The breaking up of a permanent pasture will be waste (h). So will the working of mines unopened at the commencement of the tenancy (i). So the cutting of timber, except for the purpose of repairs, is an act of waste. To that rule, however, there is apparently an exception in the case of what have been termed "timber estates"; that is to say, estates which are cultivated merely for the produce of saleable timber, and upon which the practice has been to cut the timber periodically and treat the proceeds as part of the annual profits of the land (k). Another head of damage which in former times

What
amounts to
waste.

(a) *Bulli Coal Mining Co. v. Osborne*, (1899) A. C. 351, P. C.

(b) p. 254.

(c) Bac. Abr. Vol. 8, p. 379.

(d) 3 & 4 Will. IV. c. 27.

(e) *Doherty v. Allman*, (1878) 3 App. Cas. 709.

(f) Co. Litt. 53a.

(g) *Jones v. Chappell*, (1875) L. R. 20

Eq. 539; *Meux v. Cobley*, (1892) 2 Cl. 253.

(h) Co. Lit. 53 b.

(i) *Ibid.*

(k) *Dashwood v. Magniac*, (1891) 5 Ch. 306; per Jessel, M.R., *Honeywood v. Honeywood*, (1874) L. R. 18 Eq. p. 307. *Ferrand v. Wilson*, (1845) 4 Hare. 344.

was treated as highly material in considering whether an act amounted to waste was the destruction of the evidence of the reversioner's title. Any act which so altered the character of the tenement as to diminish the means of identifying it, even though not in other respects prejudicial to the inheritance, was treated as an act of waste. But that head of damage, at all events in the case of rural estates, may at the present day be regarded as obsolete, as "nowadays, when there are ordnance surveys . . . and where the property is marked out on a map . . . any damage in regard to evidence of title is quite wild and chimerical, or is at least merely nominal" (a). Where, however, the tenant has made a material and enduring alteration in the character of the land, even though such alteration may tend to enhance its value, the misfeasance will support an action for waste, in respect of which a court will award substantial damages for the past wrong, and an injunction restraining future acts of a similar character (b). In an action for waste the measure of damages is (in the absence of any matter of aggravation) the diminution in the value of the reversion, less a discount for immediate payment (c).

All the kinds of waste above referred to belong to the class known as "voluntary waste," which consists of acts of misfeasance.

There is another class of waste known as "permissive," which consists of omission, in neglecting to keep the premises in a state of repair, in cases in which a duty to repair exists.

Permissive
waste.

Actions of tort for waste of the former class usually arise between remainderman and tenant for life. But they may also arise between landlord and tenant. Just as an act of misfeasance on the part of a bailee of a chattel is none the less a tort because it is also a breach of the contract of bailment (d), so with an act of voluntary waste on the part of a tenant for a term of years. Actions for permissive waste, on the other hand, rarely arise

(a) *Per* Lord Blackburn, *Doherty v. Allman*, (1878) 3 App. Cas. p. 735. And see *per* Jessel, M.R., *Jones v. Chappell*, (1875) L. R. 20 Eq. p. 542.

(b) *West Ham Central Charity Board v. East London Waterworks Co.*, (1900) 1 Ch. 624.

(c) *Whitham v. Kershaw*, (1885-6) 16 Q. B. D. 613.

(d) *Hayn v. Culliford*, (1879) 4 C. P. D. 182. As to when a bailee is *not* responsible for the tortious act of his servant, see *Sanderson v. Collins*, (1904) 1 K. B. 628.

except as between landlord and tenant and as between such parties, whatever the form of action may have been in the past, it can hardly at the present day be regarded otherwise than as an action for breach of contract. No action of tort will lie against a tenant for life for permissive waste (a), even in the case of manor-holds (b), unless by the terms of the will or deed creating the settlement he is expressly required to keep the premises in repair (c).

Equitable waste.

It is not unusual in instruments of settlement to provide that the tenant for life shall be unimpeachable of waste. The effect of such a provision at law was to enable the tenant to cut down all the timber on the estate or commit any other acts of voluntary waste with impunity (d). But from comparatively early times the Court of Chancery interfered to prevent him from committing what was known as "equitable waste," that is to say, making an unconscientious use of his legal right (e), such as wantonly destroying the mansion house (f), or cutting down ornamental timber (g). Such equitable waste, however, not being a breach of any legal duty was not at common law the subject of an action for a tort. But now the legal right to commit waste of that description has been taken away by the Judicature Act, which provides by s. 25, subs. (3), that "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." By that provision the jurisdiction of the Court to interfere to prevent equitable waste in the future seems to be rested upon a new ground, namely, the presumption of absence of intention on the part of the settlor to confer a right to commit it.

Ecclesiastical dilapidations.

The action which by the common law lay against the executors

(a) *In re Cartwright*, (1899) 41 Ch. D. 532.

(b) *Parry and Hopkins, In re*, (1900) 1 Ch. 160.

(c) *Woodhouse v. Walker*, (1880) 5 Q. B. D. 404.

(d) *Per Turner, L.J., Micklethwait v. Micklethwait*, (1857) 1 De G. & J. p. 524.

(e) *Micklethwait v. Micklethwait*,

(1847) 1 De G. & J. at p. 524.

(f) *Vane v. Barnard*, (1716) 2 Vern. 738.

(g) *Marquis of Downshire v. Lady Sandys*, (1801) 6 Ves. 107. By this term "ornamental" is to be understood not trees which are in fact ornamental, but trees which are planted for the purposes of ornament: *Wombwell v. Belasyse*, (1825) 6 Ves. 110 a (note).

of a deceased incumbent of an ecclesiastical benefice at the suit of his successor for dilapidations was an action of tort in the nature of waste (a). The position of an incumbent was analogous to that of a tenant for life with this difference, that he was liable for permissive as well as voluntary waste. The damages recovered in such action were not payable by the executor until after all the simple contract debts of the testator had been satisfied; and, when paid, the party receiving them was under no obligation to expend them in repairs. But the law on this subject has been altered by the Ecclesiastical Dilapidations Act, 1871 (b), which provides that, the amount of the dilapidations having been ascertained by the bishop's surveyor, the bishop shall make an order stating the costs of the repairs for which the late incumbent's estate is liable, and the sum stated in the order is to be a debt (c), which debt is payable *pari passu* with the other debts of the deceased (d). The action being now in form an action of debt, it seems doubtful whether ecclesiastical dilapidations can any longer be regarded as coming within the category of torts. The new incumbent upon recovery of the money is not now entitled to retain it for his own use, but is bound to pay it over to the Governors of Queen Anne's Bounty (e), to be applied for repairs.

(a) As to this action, see the judgment of Lord Denman in *Mason v. Lambert*, (1848) 12 Q. B. 795, 799.

(b) 34 & 35 Vict. c. 43.

(c) s. 36.

(d) *In re Monk*, (1887) 35 Ch. D. 583,

(e) s. 37.

Canadian Notes to Chapter XIII.

TRESPASS TO LAND AND DISPOSSESSION.

POSSESSION, PROOF OF (a).

The plaintiff in trespass must be prepared to prove an actual and immediate occupation of the *locus in quo* (b). Where the plaintiffs at first relied upon a paper title which turned out to be defective, they were afterwards allowed to give additional evidence

(a) P. 323, *supra*.

(b) *McNeil v. Train*, 5 U. C. R. 91.

Ontario. of possession and go to the jury upon that (a). Where the land is vacant, proof of paper title is *prima facie* sufficient to maintain trespass (b).

Canada. Where M. purchased from L., between whose lot and that of McL. there existed a fence on a conventional boundary, not the true lot line, M. was held not entitled to bring an action of trespass against McL. as to the property between the true and the conventional boundary (c).

Possession is not necessary to a complainant under some of the Acts relating to petty trespasses—*e.g.*, R. S. B. C. 1897, c. 186, gives the benefit of the Act to the “owner, lessee, or occupier of the land.”

DE FACTO POSSESSION (d).

Ontario. A trespasser “is confined to what has been called his pedal possession; and even occasional acts of trespass committed by him on other parts of the property will not be taken as extending his actual peaceable possession over such parts” (e).

British Columbia. A person in possession of waste lands of the Crown (with the consent of the Crown) can maintain trespass against persons having no title (f).

Nova Scotia. Where neither plaintiff nor defendant can establish documentary title, the Court may be put to it to decide whose acts have given better evidence of possession. Thus, where the property was a beach, the plaintiff, who showed user for the purpose of piling lumber and drying fish, was held entitled to maintain trespass against a defendant who showed user for the purposes of hauling up one or two boats during the fishing season (g).

JUS TERTII (h).

Ontario. “The defendants in an action of trespass to land are at liberty, under the plea that the land is not the plaintiffs’, to show title in themselves or in another under whose authority they acted” (i).

(a) *Boulton v. Shand*, 10 U. C. R. 351.

(b) *Ball v. Young*, 8 U. C. C. P. 231.
See *Huffman v. Rush*, 7 O. L. R. 346 (1904), possession of defendant must be unequivocal to bar true owner; see also cases collected in Hunter's Real Property Statutes, pp. 356—381.

(c) *Mooney v. McIntosh*, 14 S. C. R. 740 (1887).

(d) P. 323, *supra*.

(e) Robinson, C.J., in *Weld v. Scott*,

12 U. C. R. 537 (1855).

(f) *Nelson and Port Sheppard R. W. Co. v. Parker*, 6 B. C. R. 1.

(g) *McDougall v. McNeil*, 24 N. S. B. 322 (1892).

(h) P. 327, *supra*.

(i) Robinson, C.J. in *Gray v. Harding*, 21 U. C. R. 241 (1861); cf. *McMillan v. McMillan*, 12 U. C. C. P. 158.

FORCIBLE ENTRY (a).

The Criminal Code of Canada (R. S. C. 1906, c. 146) provides:—

Sect. 102: *Forcible Entry and Detainer*.—Forcible entry is **Canada.** where a person, whether entitled or not, enters in a manner likely to cause a breach of the peace or reasonable apprehension thereof on land then in actual and peaceable possession of another. Sub-s. 2 defines forcible detainer; sub-s. 3, what amounts to actual possession or colour of right is a question of law; sub-s. 4, penalty one year's imprisonment.

On an indictment for forcible entry and detainer of land, evidence of title in defendant has been held not admissible (b). An entry by thirty or forty persons would be sufficient to afford "reasonable apprehension" (c).

A warrant or writ of restitution might, in the discretion of the judge at trial, be granted (d) or refused (e).

It seems that an entry for the sole purpose of taking away chattels on the land is not such a "forcible entry" as is contemplated by s. 102; even if made contrary to the will of the occupant, and in a manner likely to cause a breach of the peace, it is only a trespass (f).

See also R. S. N. S. 1900, c. 173 (*Forcible Entry and Detainer*), **Nova Scotia.** s. 1, warrant and holding to bail; s. 2, not to issue after three years; s. 3, case may be tried as a civil action, and damages awarded.

WHERE THERE IS TITLE, POSSESSION NEED NOT BE EXCLUSIVE (g).

The mere enclosure of the land of another by an adjoining **Canada.** proprietor by putting up a fence for the purpose of protecting the lands of both against cattle (said fence being made by mutual arrangement) does not prevent the actual owner bringing trespass against an intruder or anyone using it for any other purpose than the one for which it had been enclosed (h).

PROJECTING OBJECTS (i).

See *Parent v. Quebec North Shore Turnpike Road Trustees* (k). **Canada.**

(a) P. 333, *supra*.

(b) *Regina v. Cokely*, 13 U. C. R. 521.

(c) *Regina v. Smith*, 43 U. C. R. 369 (1878).

(d) *Regina v. Smith*, 43 U. C. R. 369.

(e) *Regina v. Connor*, 2 P. R. 139 (1851); *Regina v. Wightman*, 29 U. C. R. 211; *Rea v. Jackson*, Dra. 50.

(f) *Regina v. Pike*, (1898) 12 M. L. R. 314.

(g) P. 336, *supra*.

(h) *Conway v. Brookman*, 35 S. C. R. 185; 35 N. S. R. 462.

(i) P. 338, *supra*.

(k) 31 S. C. R. 556, projecting roof of toll-house, waiver.

JUSTIFICATION OF TRESPASS (a).

Manitoba. A trespass may be justified upon any valid ground, and that although some invalid reason may have been given at the time of trespass (b).

RIGHT OF WAY: USER IN EXCESS (c).

**Nova
Scotia.**

The removal and tearing down of a gate on the property is an excess in the exercise of a right of way (d).

The mere user of a right of way (in the absence of any legal right) will not entitle a plaintiff to damages against a defendant for obstructing the way (e).

PUBLIC WAY (f).

Canada.

For consideration of the doctrine that an abutting owner owns *ad medium filum viæ*, see *O'Connor v. Nova Scotia Telephone Co.* (g).

EASEMENTS (h).

**Nova
Scotia.**

The grant of a right to maintain a water tank on the plaintiff's premises will not justify the maintenance of a considerably larger tank, thus imposing a greater burden on the land (i).

LEAVE AND LICENCE (k).

Ontario.

The licence must have been given by a person authorised to give it (l), and must be co-extensive with the trespass (m), and the defendant must have strictly complied with the conditions of the licence (n).

A document not under seal, and not sufficient to create an easement, may be sufficient as a licence to prevent the plaintiff recovering damages (o).

(a) P. 344, *supra*.

(b) *Dederick v. Ashdown*, 4 M. L. R. 139.

(c) P. 347, *supra*.

(d) *McCormack v. Dennison*, 15 N. S. R. (3 R. & G.) 71.

(e) *Ells v. Black*, 19 N. S. R. (7 R. & G.) 222; 7 C. L. T. 326.

(f) P. 347, *supra*.

(g) 22 S. C. R. 276.

(h) P. 349, *supra*.

(i) *Corbitt v. Digby Water Co.*, 24 N. S. R. 25 (1891).

(k) P. 351, *supra*.

(l) It has been found necessary to decide that the defendant accused of

breaking and entering plaintiff's close and debauching his daughter cannot set up the leave and licence of the daughter: *Ross v. Merritt*, 2 U. C. R. 421.

(m) *Thompson v. Van Buskirk*, 14 U. C. R. 388.

(n) *Lunn v. Turner*, 4 U. C. R. 282.

(o) *Robinson v. Fetterly*, 8 U. C. R. 340. Cf. *Brougham v. Balfour*, 3 U. C. C. P. 297, must be at least a written agreement; *Burnside v. Marcus*, 17 U. C. C. P. 430, doubtful lease *Canada Co. v. Pettes*, 9 U. C. R. 66, effect of letter by corporation; *Nicol v. Tackaberry*, 10 Gr. 109, oral agreement when enforceable.

For the pleading of leave and licence and evidence thereof, Ontario.
see cases below (a).

REVOCABLE LICENCE (b).

A defendant having gone in under a revocable licence cannot set up expropriatory powers not originally acted on (c). Nova Scotia.

LICENCE WHEN NOT ASSIGNABLE (d).

It does not follow that because a licence is coupled with an interest it becomes assignable; the personal quality of the grantee may be material (e). Ontario.

IRREVOCABLE LICENCE (f).

Where the sheriff had seized goods under *fi. fa.*, and allowed them to remain on the defendant's premises on the understanding that they should be sold there on a future day if the money were not paid before: Held, that the licence thus given to enter on the premises and sell the goods accordingly could not be revoked by the defendant (g). Ontario.

WRONGFUL WORKING OF MINERALS (h).

The measure of damages for ore negligently abstracted by trespass workings is the same as if the trespass is wilful, and only the cost of bringing the ore to bank will be allowed. The value of the ore so abstracted is value to the owner at the time of the taking (i). British Columbia.

But where the abstraction has been done by a predecessor in title, and left lying on a dump, the value is its market value as it lies, and not before abstraction (k).

(a) *Haggarty v. Pryor*, 9 N. S. R. (3 N. S. D.) 358, should be pleaded if evidence given of leave and licence; *Slee v. Graham*, fraud in obtaining should be pleaded; *Crosswaite v. Gage*, 32 U. C. R. 196, survey; *Marrs v. Davidson*, 26 U. C. R. 641, trespass done partly after revocation of licence; *Walter v. Dexter*, 34 U. C. R. 426, licence omitted from conveyance; *Dawson v. Murray*, 29 U. C. R. 464, entry under fence-viewers' award treated as under licence; *Brown v. Street*, 1 U. C. R. 124, long possession of an easement proof of leave and licence.

(b) P. 351, *supra*.

(c) *Town of Dartmouth v. Dartmouth*

Rolling Mills Co., 1 East. L. R. 194 (1906).

(d) P. 352, *supra*.

(e) *Ross v. Fox*, 13 Gr. 683, licence to miner to dig for ore (grantor entitled to royalty of one-twentieth).

(f) P. 353, *supra*.

(g) *McGillis v. McMartin*, 1 U. C. R. 145.

(h) P. 359, *supra*.

(i) *Last Chance Mining Co., Ltd. v. American Boy Mining Co., Ltd.* 2 M. M. C. 150.

(k) *Centre Star Mining Co., Ltd. v. Rossland Kootenay Mining Co., Ltd.* 2 M. M. C. 232.

STATUTES OF LIMITATION (a).

Each province has a Statute of Limitations as to realty, generally adapted from the Imperial legislation. The decisions on these statutes are too numerous for the limits of this work.

Ontario.	R. S. O. 1897, c. 133 (Real Property Limitation Act) (b).
Alberta and Saskatchewan.	C. O. N. W. T. 1898, c. 31, s. 2: The Real Property Limitation Act, 1874 (Imperial), declared in force.
British Columbia.	R. S. B. C. 1897, c. 123 (Limitation of Action), Part II., as to real property.
Manitoba.	R. S. M. 1902, c. 100 (The Real Property Limitation Act).
New Brunswick.	C. S. N. B. 1903, c. 139 (Limitation of Actions in respect to Real Property).
Nova Scotia.	R. S. N. S. 1900, c. 167 (The Statute of Limitations).

WASTE BY PERSON IN POSSESSION (c):
MORTGAGOR.

Ontario.	Generally a mortgagor in possession is not liable for waste (d) until after foreclosure (e).
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WASTE : ALTERATION TO TENEMENT (f).

Ontario.	For a review of authorities on waste by alterations, see <i>Holderness v. Lang</i> (g).
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WASTE : THE WORKING OF MINES UNOPENED (h).

Ontario.	Boring for oil may be waste (i).
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WASTE : CUTTING TIMBER (k).

Ontario.	All the niceties of the ancient learning as to waste are not to be transferred without discrimination to such a country as this province (l). Thus where the timber actually growing was not
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(a) P. 363, *supra*.

(b) The Ontario decisions on the Statute of Limitations are too numerous to be inserted here. A good many of them have been collected and examined in Hunter's Real Property Statutes (1894).

(c) P. 376, *supra*.(d) *Wafer v. Taylor*, 9 U. C. R. 609.(e) *Cawthra v. McGuire*, 5 U. C. L. J.142 ; see also *Scott v. Vosburg*, 8 P. R. 336 ; *McLeod v. Avery*, 16 O. R. 365.(f) P. 376, *supra*.

(g) 11 O. R. 1 (1886).

(h) P. 376, *supra*.(i) *Lancey v. Johnston*, 29 Gr. 67.(k) P. 376, *supra*.(l) *Hixon v. Reareley*, 9 O. L. R. 6 (1905).

suitable for the needed repairs, it was held not to be waste to sell Ontario.
just sufficient timber to recoup the expense of repairs provided
the timber was cut with due regard to the situation of the bush
and the cleared land (a).

Cutting down timber on wild land for the sole purpose of
bringing it into cultivation is not waste (b).

A tenant in dower is entitled to cut down trees for fuel, Nova
fencing, improvement and cultivation, but not to sell the wood Scotia.
for other and different purposes to the permanent injury of
the reversioners; and for such injury is responsible to the
reversioners (c).

WASTE : REMOVAL OF BUILDING (d).

The right to restrain waste involved in the removal by a Manitoba.
tenant of a building forming part of the freehold is clear (e).

PERMISSIVE WASTE (f) : TENANT FOR LIFE (g).

No action will lie for permissive waste against a tenant for Ontario.
life (h).

Accidental fire is permissive waste for which a lessee is not
liable in the absence of an express covenant to repair (i).
Allowing thistles or other noxious weeds to grow on the land is
not permissive waste, but ill husbandry (k).

(a) *Hixon v. Reaveley*, 9 O. L. R. 6
(1905).

(b) *Drake v. Wigle*, 24 U. C. C. P.
405 (1874), discussing *Weller v. Burn-*
ham, 11 U. C. R. 90. See also *Tayler v.*
Tayler, 5 O. S. 501; *Saunders v.*
Breakie, 5 O. R. 603; *Munsie v. Lind-*
say, 10 P. R. 173. Cf. *Campbell v.*
Shields, 44 U. C. R. 449, tapping for
maple sugar; *Lewis v. Godson*, 15 O. R.
252, removing stones.

(c) *Titus v. Sulis*, 9 N. S. R. (3
N. S. D.) 497.

(d) P. 376, *supra*.

(e) *Gray v. McLennan*, 3 M. L. R. 337.

(f) P. 377, *supra*.

(g) P. 378, *supra*.

(h) *Patterson v. Central Canada*
L. & S. Co., 29 O. R. 136 (1898),
Boyd C. (following *In re Cartwright*,
(1889) 41 Ch. D. 532).

(i) *Wolfe v. McGuire*, 28 O. R. 45.

(k) *Patterson v. Central Canada*,
supra. The statute R. S. O. 1897,
c. 279 (noxious weeds, &c.), does not
give a remedy in tort.

CHAPTER XIV.

NUISANCE.

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Private
nuisance
defined.

NUISANCES are of two kinds, private and public. A private nuisance has been defined to be “anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another, and not amounting to a trespass” (a). It includes all kinds of damage arising from water (other than that caused in certain cases by mine water), filth, fire, gases, or other noxious things being caused or permitted to pass from the defendant’s land on to the plaintiff’s (b), all damage arising from improper use of a natural stream, damage arising from the excavation of the defendant’s land, and the consequent withdrawal of the support to which the plaintiff’s land is entitled, obstructions of easements of all kinds, and injuries to rights of profit à prendre.

But to amount to a nuisance the degree of hurt or annoyance must in each case be substantial. Thus where the plaintiff complained that the trees and other vegetation on his land were damaged by the escape of fumes from the defendant’s smelting works, the jury were held to have been rightly directed “that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore in an action for nuisance to property, arising from noxious vapours, the injury, to be actionable, must be such as visibly to

(a) Stephen’s Com. 1st Ed. Vol. 3, p. 499. (b) As to the duty to prevent damage of this kind, see below, pp. 425, 499.

diminish the value of the property and the comfort and enjoyment of it" (a).

With regard to interferences with the water of a natural stream, however, it is to be observed that there is one case in which the injury even though substantial will not amount to an actionable nuisance. It has been laid down that, in the course of what is termed the ordinary use of water, the use, that is to say, *ad lavandum et potandum*, for domestic purposes and for cattle, a riparian owner may without regard to the necessities of the lower owners take water from the stream without limit, even to the exhaustion of the whole supply (b), and the rule is usually so stated; but the proposition has been doubted (c). If by the use of the water for any other purposes, such as irrigation, or manufacture, or the supply even for domestic use of persons whose premises are situate on land not riparian, an upper riparian owner sensibly diminishes the volume of the stream, he will be liable as for a nuisance (d). The law on this subject is thus admirably summarised in Kent's Commentaries (e): "Every proprietor of lands on the banks of a" (natural) "river has . . . an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run" (*currere solebat*) "without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. . . . Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above." Moreover,

Nuisance to stream.

(a) *St. Helen's Smelting Co. v. Tipping*, (1865) 11 H. L. C. 642.

(b) *Per* Lord Kingsdown, *Miner v. Gilmour*, (1858) 12 Moore, P. C. p. 156.

(c) *Lord Norbury v. Kitchin*, (1863) 9 Jar. N. S. 132.

(d) *McCartney v. Londonderry &*

Lough Swilly R., (1904) A. O. 301; and see *Swindon Waterworks Co. v. Wilts & Berks Canal Navigation Co.*, (1875) L. R. 7 H. L. 697; *per* Parke, B., *Embrey v. Owen*, (1851) 6 Exch. p. 371.

(e) 12th Ed. Vol. 3, p. 439.

manure or other impurities to their source as in tracing the cause of the diminution of the water supply (a).

Fouling
artificial
watercourse.

In this respect an artificial watercourse above ground stands on the same footing as underground percolating water. A person through whose land the watercourse flows, although he may have no right to have the flow continue, is entitled to sue for a nuisance any owner higher up the stream who pollutes it so as to deprive him of the beneficial enjoyment of the water whilst it continues to run (b).

Withdrawal
of support.

The mere withdrawal of the support to which a person's land is entitled, whether as a natural incident of ownership or as an easement, from the land of the adjoining owner, is not of itself a nuisance; there is nothing *per se* wrongful in the excavation or removal of the supporting soil; it only becomes wrongful if and when a subsidence of the plaintiff's soil follows (c). And further, a subsidence to create a cause of action must be something more than merely nominal, it must be appreciable (d).

The right of support is limited to support by soil, it does not extend to the hydrostatic pressure afforded by underground water percolating through the soil; and therefore one who by draining his own land withdraws from an adjoining owner the support of water theretofore lying beneath the land of that owner, and thereby causes the surface of that land to subside, is not liable for the damage inflicted (e). To this rule an exception is created by statute in certain cases of subsidence caused by brine pumping operations (f). The general principle involved in the above proposition will not, however, apparently, be extended by the Courts to cases in which the withdrawal of support results in a subsidence of the adjacent surface by the oozing out of wet

(a) As to the pollution of water supply by a gas company, acting under statutory powers, see *Batcheller v. Tunbridge Wells Gas Co.*, (1901) 84 L. T. 765; and as to the fouling of surface water see *Gibbings v. Hungerford*, (1904) 1 Ir. R. 211 C. A.

(b) *Wood v. Waud*, (1849) 3 Exch. p. 779.

(c) *Backhouse v. Bonomi*, (1858-61) 9 H. L. C. 503; *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127;

Crumbie v. Wallsend Local Board, (1891) 1 Q. B. 503.

(d) *Smith v. Thackeray*, (1866) L. R. 1 C. P. 564. This is apparently all that that case was intended to decide, see above, p. 133. And see *per* Collins, J., in *Attorney-General v. Conduit Colliery Co.*, (1895) 1 Q. B. 301.

(e) *Popplewell v. Hodgkinson*, (1869) L. R. 4 Ex. 248.

(f) 54 & 55 Vict. c. 40.

sand, silt, or other partially liquid substance (a). And in the case of the *Trinidad Asphalt Co. v. Ambard* (b), an injunction was granted and damages recovered by the plaintiffs from the defendants, who, by reason of the removal of lateral support, caused a semi-fluid substance of commercial value to ooze out on to their own land, where it was appropriated by them.

Again, the right of support, apart from any easement to have a greater degree of support, is limited to support afforded to land in its natural state, that is to say, to land on the one hand unburdened with the weight of buildings, reservoirs of water, or other artificial erections which would tend to increase the natural downward or lateral thrust (c); and, on the other hand, unweakened by any artificial excavation on any intervening strip of land (whether belonging to the plaintiff or a third party) lying between it and the soil from which the right of support is claimed (d). But if, in an action against the adjoining owner for removing the support afforded to the soil under the plaintiff's house and thereby causing the plaintiff's house to fall, it be proved that the land on which the house stood would have subsided appreciably even if it had been unburdened with the weight of the house (e), the plaintiff is entitled to recover in respect of the damage to the house, although it may be modern and no right of support for it has been acquired (f). Moreover, it has been held, though possibly the decision is open to exception, that an express reservation by a vendor of the right of lateral severance, in a conveyance of one of two adjacent properties, will not disentitle the purchaser to damages should the vendor subsequently to the sale (by reason of such lateral severance of support), in fact, let the purchaser's property down (g). An owner of a modern house which *de facto* enjoys the support of the adjoining soil, though not entitled as against the adjoining

(a) *Jordeson v. Sutton, &c., Gas Co.*, (1899) 2 Ch. 217, C. A.

(b) (1899) A. C. 594, P. C.

(c) *Per Lord Tenterden, Wyatt v. Harrison*, (1832) 3 B. & Ad. p. 876.

(d) *Corporation of Birmingham v. Allen*, (1877) 6 Ch. D. 284.

(e) *Smith v. Thackeray*, (1866) L. R. 1 C. P. 564.

(f) *Brown v. Robins*, (1859) 4 H. & N.

186; *Stroyan v. Knowles*, (1861) 6 H. & N. 454.

(g) *Richards v. Harper*, (1866) L. R. 1 Ex. 199.

owner not to have that support withdrawn, is so entitled as against a wrong-doer (a).

Nuisance to
ancient lights.

With regard to the access of light to ancient windows the extent of the right is "to have that amount of light through the windows of a house which is sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house, if it is a warehouse, a shop, or other place of business" (b).

Distinction
between
business
premises and
dwelling-
houses.

There is, however, a great distinction between a nuisance of this description in the case of business premises and a similar nuisance in the case of a dwelling-house.

In the former, the question is whether the plaintiff is prevented from carrying on his business as beneficially and as profitably as before the defendant entrenched on his light; in the latter, the question is, whether the plaintiff's house has to a sensible degree been rendered less fit for habitation than it was before; that is to say, whether the light has been so materially diminished as to render those particular portions of the dwelling actually interfered with by the obstruction complained of appreciably less comfortable and convenient than they were.

In either case, when the nuisance is such as to give a right of action, the question as to whether the remedy shall be in damages, or by mandatory injunction, apparently depends on the degree of obstruction.

If the damage be irremediable, it seems probable that as a mandatory injunction to abate the nuisance is the only adequate remedy it will be granted as a matter of course. But, on the other hand, if the discomfort or pecuniary loss, though considerable, is capable of appraisal, and is not such as to render the business premises or residence absolutely unfitted

(a) *Jeffries v. Williams*, (1850) 5 Exch. 792. Presumably the same principle would apply to modern lights where blocked by a hoarding on a highway causing a nuisance. But the point has never arisen for decision.

(b) *Per James, L.J., Kelk v. Pearson*,

(1871) L. R. 6 Ch. p. 811. See too *Parker v. Smith*, (1832) 5 C. & P. 438; *Wells v. Ody*, (1836) 7 C. & P. 410; *Dent v. Auction Mart Co.*, (1866) L. R. 2 Eq. p. 245; *Ambler v. Gordon*, (1905) 1 K. B. 417; and *Colls v. Home & Colonial Stores*, *infra*, next page.

for comfortable and convenient or profitable occupation, the remedy will be probably in damages (a).

In one case, indeed, Malins, V.-C., suggested that if a person can show enjoyment of an extraordinary amount of light for twenty years to the knowledge of the servient owner, he will be entitled to the access of an amount of light equal to that which he has enjoyed, and not merely to an amount sufficient for all ordinary purposes (b). This *dictum*, however, seems opposed to the principle of the cases above cited, and it is apprehended that the servient owner's knowledge of the user could make no difference.

There seems at one time to have existed a notion that an obstruction which left forty-five degrees of sky unobscured could not amount to an actionable interference with the plaintiff's lights. This notion, which seems to have arisen from a reference to the Metropolitan Building Act, an Act passed wholly *alio intuitu*, has been pronounced to be a mistaken one (c). Whether there has been a substantial obstruction or not is a question of fact in each case. But at the same time it appears that, "if forty-five degrees are left, this is some *primâ facie* evidence of the light not being obstructed to such an extent as to call for the interference of the Court—evidence which requires to be rebutted by direct evidence of injury and not by the mere exhibition of models (d).

When once it is established that the interference with the plaintiff's light will produce substantial damage, the plaintiff will be *primâ facie* entitled to an injunction in general terms without referring to the angle of incidence of the light, unless there is some special evidence justifying the insertion of such a clause (e). Moreover, where evidence is adduced that the obstruction is actually productive of substantial loss, the plaintiff

(a) *Kine v. Jolly*, (1905) 1 Ch. 481, C. A.; *Higgins v. Betts*, (1905) 2 Ch. 210.

(b) *Lanfranchi v. Mackenzie*, (1867) L. R. 4 Eq. pp. 430, 431; and see *Ruscoe v. Grounsell*, (1903) 89 L. T. 426.

(c) *Per* Cotton, L.J., *Parker v. First Avenue Hotel Co.*, (1883) 24 Ch. D. p. 289; *Home & Colonial Stores v. Colls*,

(1902) 1 Ch. 302, C. A. Reversed on appeal by House of Lords, *sub nom. Colls v. Home & Colonial Stores*, (1904) 20 T. L. R. 475.

(d) *Per* Lord Selborne, *City of London Brewery Co. v. Tennant*, (1873) L. R. 9 Ch. p. 220.

(e) *Parker v. First Avenue Hotel Co.* (1883) 24 Ch. D. 282.

is, almost as a matter of course, entitled to an injunction, damages not constituting a sufficient vindication of his legal right (a). And a similar rule applies where there is a threatened interference with a clearly vested legal right to an easement of light (b).

Nuisances
productive of
personal
discomfort.

Acts which are productive of mere personal discomfort may amount to an actionable nuisance, as, for instance, where the defendant creates stench by the carrying on of an offensive manufacture or otherwise (c), or causes excessive volumes of smoke to pass from his chimneys on to the plaintiff's property (d), or makes unreasonable noises upon his land (e), or impairs the amenity of a neighbourhood by vibration and noise (f), even though the nuisance be of a temporary character (g), or uses a building as a hospital for infectious diseases whereby the adjoining owners live in perpetual dread of infection (h), or interferes with the quiet enjoyment of the inhabitants of a residential neighbourhood by holding horse-races on Sunday (i), or injures adjacent property by the collection of crowds (k), or by watching and besetting a man's house compels him to do or not to do that

(a) *Jordeson v. Sutton, &c., Gas Co.*, (1899) 2 Ch. 217, C. A.

(b) *Cowper v. Laidler*, (1903) 2 Ch. 337. For recent decisions on "ancient lights," see *Easton v. Isted*, (1903) 1 Ch. 405, C. A.; *Quick v. Chapman*, (1903) 1 Ch. 659, C. A.; *Godwin v. Schweppes, Ltd.*, (1902) 1 Ch. 926; *Colls v. Home & Colonial Stores, supra*.

(c) Brick-burning, *Walter v. Selfe*, (1851) 4 De G. & Sm. 315; *Bamford v. Turnley*, (1860) 3 B. & S. 62; soap-boiling, *Rex v. Pierce*, (1683) 2 Show. 327; effluvia from factory chimney, *Crump v. Lambert*, (1867) L. R. 3 Eq. 409; keeping swine, *Aldred's case*, (1610) 9 Rep. 57 b; fat-melting, *Attorney-General v. Cole*, (1901) 1 Ch. 205.

(d) *Crump v. Lambert*, (1867) L. R. 3 Eq. 409; and see *McNair v. Baker*, (1904) 1 K. B. 208; *Tough v. Hopkins*, (1904) 1 K. B. 805. All offences under s. 24 of the Public Health (London) Act, 1891.

(e) Revolving machinery of factory,

Crump v. Lambert, supra; using ground-floor of a house in a residential street as a stable for horses, *Ball v. Ray*, (1873) L. R. 8 Ch. 467; holding circus performances, involving music and shouting, *Inchbald v. Robinson*, (1869) L. R. 4 Ch. 338; ringing chapel bell, *Soltan v. De Held*, (1851) 2 Sim. N. S. 133; firing on rifle range, *Hawley v. Steele*, (1877) 6 Ch. D. 521.

(f) *Knight v. Isle of Wight Electric Light & Power Co.*, (1904) 73 L. J. Ch. 299; *Rushmer v. Polsue & Alfieri, Ltd.* (1905) 21 T. L. R. 183.

(g) *Colwell v. St. Pancras Borough Council*, (1904) 1 Ch. 707.

(h) *Metropolitan Asylum District v. Hill*, (1881) 6 App. Cas. 193. But see *Att.-Gen. v. Nottingham Corporation*, (1904) 1 Ch. 673; *Att.-Gen. v. Rathmines & Pembroke Hospital Board*, (1904) 1 Ir. R. 161, C. A.

(i) *Dewar v. City & Suburban Racecourse Co.*, (1899) 1 Ir. R. 345.

(k) *Chase v. London County Council*, (1898) 62 J. P. 184.

which it is lawful for him not to do or to do (a), or causes excessive heat to pass into an adjacent tenement comprised in the same block of buildings (b). And generally a right of action accrues whenever there is a non-natural or exceptional user of property resulting in substantial damage or annoyance to neighbouring residents (c). Nor is there apparently, at least in Great Britain, any right to the reasonable and proper use of business premises for an admittedly offensive trade when such reasonable user constitutes a substantial nuisance (d), though these latter propositions are subject to certain qualifications, discussed in the ensuing pages. But the general requirement that a nuisance, to be actionable, should be substantial, applies with even greater force to cases in which the nuisance complained of is one causing personal discomfort than where it causes an injury to the land itself. When it is said that a house-owner is entitled to have the air in his house untainted and unpolluted by any acts of his neighbour, by that is meant that he is entitled to have "not necessarily air as fresh, free and pure as at the time of building the plaintiff's house the atmosphere then was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence" (e). Moreover, the discomfort must be substantial not merely with reference to the plaintiff; it must be of such a degree that it would be substantial to any person occupying the plaintiff's premises, irrespective of his position in life, age, or state of health; it must be "an inconvenience naturally interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people" (f).

It was at one time thought that interference with the enjoyment of property, produced by the carrying on of a noxious trade, could not be actionable, however substantial the annoyance

How far
locality
affects the
question of
nuisance or
no nuisance.

(a) *Lyons v. Wilkins*, (1899) 1 Ch. 255. A. C. 381, P. C.

(b) *Sanders-Clark v. Grosvenor Mansions Co.*, (1900) 2 Ch. 373. (d) *Attorney-General v. Cole*, (1901) 1 Ch. 205.

(c) *Eastern Telegraph Co., Ltd. v. Cape Town Tramways Co., Ltd.*, (1902) (e) *Per Knight Bruce, V.-C., Walter v. Selfe*, (1851) 4 De G. & Sm. p. 321.

(f) *Ibid.* p. 322.

amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of property" (a).

So again in the case of a user involving interference with water rights, ancient lights, or other easements, the degree of interference which will be actionable will to some limited extent probably depend upon the nature of the locality. Thus, although in general a proprietor of land on the bank of a natural stream may complain if a higher riparian owner, in using the water for extraordinary (as opposed to domestic) purposes, diminishes the volume or purity to a substantial extent, yet it has been doubted whether, owing to the development of trade in a particular district, the use of water in such district for trade purposes may not under certain circumstances be regarded as an ordinary user (b), so as to disentitle a lower owner to complain even of a sensible diminution in the supply. And it may also be doubted whether the fact of the district being devoted to trades may not also diminish to some extent the degree of purity to which the lower riparian owners will be entitled. Still at the most it can only be an element in the case (c). On the other hand, where it was attempted to be set up as a defence to an action against a higher riparian owner for discharging soapsuds into the stream, that the plaintiffs had suffered no damage because the water, before it reached the defendant's mill, was already so polluted by other mills and dye-works higher up the stream, that the pollution by the defendant did not make the water less applicable to useful purposes than it was before, the Court held that this fact afforded no defence, for "the defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works. If the dye-works and other manufactories, and other sources of pollution above the plaintiffs, should be afterwards discontinued, the plain-

(a) *Per* Lord Westbury, (1865) 11 H. L. C. at p. 650.

(b) *Per* Brett, M.R., *Ormerod v. Todmorden Mill Co.*, (1883) 11 Q. B. D. p. 168.

(c) A plea that the defendants "were

using every reasonably practicable and available means of rendering the pollutions harmless" has been held no defence, *Midlothian County Council v. Pumpherston Oil Co., Ltd.*, (1904) 6 F. 387, Ct. of Sess.

tiffs, who would otherwise have had in that case pure water, would be compellable to submit to this nuisance, which then would do serious damage to them" (a).

So, again, in dealing with the question whether an obstruction of light is sufficiently substantial to amount to an actionable nuisance, the locality in which the house is situate is a matter which may be considered. The authorities, however, on the subject are conflicting. In *Clarke v. Clark* (b) Lord Cranworth is reported to have said that "persons who live in towns, and more especially in large cities, cannot expect to enjoy continually the same unobstructed volumes of light and air as fall to the lot of those who live in the country," and that the Court will take the fact of the house being so situate in a populous town into consideration in estimating the damage caused by obstructing an ancient light. But in the subsequent case of *Yates v. Jack* (c), the same judge took the opposite view, and referred to the fact of the Prescription Act having expressly repealed the customs of certain cities, whereby the owners of houses were permitted to raise their houses and thereby obstruct their neighbours' lights with impunity, as indicating that in the opinion of the Legislature no distinction in this respect was to be drawn between towns and country districts. And this latter view was adopted by Page-Wood, V.-C., in *Dent v. Auction Mart Co.* (d), where he treated the *dictum* in *Clarke v. Clark* as overruled. In *Kelk v. Pearson* (e), however, James, L.J., seems to have preferred the case of *Clarke v. Clark*, and to have intimated that the Court would have been less ready to interfere with a similar degree of obstruction of light occurring in a street in the city of London, where the defendant was using his house for city purposes, than in the case before them, which was that of open building land at Notting Hill. It has, however, been held, by the Court of Appeal, in the more recent case of *Warren v. Brown* (f), that the question of position or environment is of secondary importance

(a) *Wood v. Waud*, (1849) 3 Exch. 748; *Crossley v. Lightowler*, (1867) L. R. 2 Ch. 478. See also *Harrington (Earl of) v. Corporation of Derby*, (1905) 1 Ch. 205.

(b) (1865) L. R. 1 Ch. p. 18.

(c) (1866) L. R. 1 Ch. 299.

(d) (1866) L. R. 2 Eq. 238.

(e) (1871) L. R. 6 Ch. 809.

(f) (1902) 1 K. B. 15. But see *Colls v. Home & Colonial Stores*, (1904) 20 T. L. R. 475, H. L.; and *ante*, p. 386.

an action (a). But mere personal inconvenience caused by the plaintiff being delayed by an obstruction in the high-road, without pecuniary damage, will not suffice (b); nor is it enough that the plaintiff has been put to expense in exercising his right of abating the obstruction (c). And it is immaterial that the degree of personal inconvenience suffered may be in excess of that suffered by the rest of the public, for the court cannot enter into the consideration of the *quantum* (d). Lord Penzance's *dictum* in *Metropolitan Board of Works v. McCarthy* (e), that to entitle a person to an action for obstruction of a highway the damage suffered by him need not be different in kind from that suffered by his fellow-subjects, provided it be *more than* that suffered by them, seems hardly consistent with the authorities. In *Hubert v. Groves* (f), where by reason of an obstruction the plaintiff was compelled to carry his goods by a circuitous route, but no proof of any pecuniary loss resulting therefrom was given, the plaintiff was nonsuited. And in *Chaplin v. Westminster Corporation* (g) it was held that the erection of an electric standard in a public thoroughfare, opposite to the plaintiff's premises, whereby the transit of merchandise, from vans to warehouse across the public pathway, was impeded, afforded no ground for action.

Even if the plaintiff do suffer actual pecuniary damage from an obstruction of a highway, still he cannot bring an action for it unless that damage be the direct consequence of the obstruction. The fact that by reason of an obstruction, which does not interfere with the plaintiff's access from his premises to the street, the public traffic is diverted into another street, and the public in consequence cease to resort to his shop, whereby his profits fall off, is too remote to form a ground of action (h). The directness of the damage will in such case depend upon the

(a) *Benjamin v. Storr*, (1874) L. R. 9 C. P. 400. See too *Rose v. Groves*, (1843) 5 M. & G. 613.

(b) *Winterbottom v. Lord Derby*, (1867) L. R. 2 Ex. 316.

(c) (1867) L. R. 2 Ex. 316.

(d) *Caledonian R. Co. v. Ogilvie*, (1856) 2 Macq. 229; and see *Mayo v. Seaton Urban District Council*, (1904) 68 J. P. 7.

(e) (1874) L. R. 7, H. L. p. 263.

(f) (1794) 1 Esp. 148.

(g) *Chaplin & Co. v. Westminster Corporation*, (1901) 2 Ch. 329.

(h) *Per* Lord Chelmsford, *Ricket v. Metropolitan R. Co.*, (1864-7) L. R. 2 H. L. p. 196. The earlier case of *Wilkes v. Hungerford Market Co.* (1835) 2 Bing. N. C. 281, *contra*, must be regarded as no longer law.

distance at which the point of diversion of traffic is from the plaintiff's door (a).

Any one who creates a source of danger upon a highway, as by digging a trench across it, or placing a log or pile of stones in the middle of the roadway, or driving piles into the bed of a navigable river, is responsible in damages to any member of the public who, while using the highway, without notice of the danger, suffers any injury by reason of the dangerous obstruction. Nor is this responsibility confined to the actual tort-feasor, even though he be an independent contractor, it having been held "that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor" (b). Further, the occupier of premises immediately adjoining a highway is under a positive obligation to prevent them from getting into such a condition as to be dangerous to passengers in the highway. Thus to permit a house abutting on a highway to be ruinous and likely to fall down is a public nuisance (c), and if any portion of the house fall and injure a passer-by an action lies.

Obstructions
to highway.

Again, it has been held to be negligence, sounding in damages, in case of accident, for a railway company to omit to provide a screen at an exit from their station which was especially exposed to danger from sparks emitted by passing engines (d).

Whether an obstruction of a highway is of such a degree as to amount to a nuisance is in each case a question of fact for the jury. It is no answer to a complaint of a nuisance by obstructing a public highway that the obstruction is for the convenience of the public generally. Thus a tramway in a town may be of great convenience to the general public, but if it be

(a) *Cp. Ricket v. Metropolitan R. Co.*, (1864-7) L. R. 2 H. L. 175, with *Benjamin v. Storr*, (1874) L. R. 9 C. P. 400.

(b) *Penny v. Wimbledon Urban Council*, (1898) 2 Q. B., Bruce, J., at

p. 217, affirmed (1899) 2 Q. B. 72.

(c) *Reg. v. Watts*, (1703) 1 Salk. 357.

(d) *Atherton v. London & North-Western Ry.*, (1905) 21 T. L. R. 671, C. A.

laid down without the statutory authority, the owners will be liable for any damage it may cause to vehicles using the way (a); so, too, the projection of a quay into a public harbour to the hindrance of the navigation, is none the less a nuisance because that hindrance is counterbalanced by the advantages afforded by the quay in respect of other uses of the harbour (b).

Dangerous
excavation
adjoining
high-road.

If, again, the occupier of the adjoining land suffer an excavation immediately adjacent to the highway to be unfenced so as to be dangerous to persons using the way, he will be responsible as for a nuisance (c). But the excavation must be substantially adjoining the way "so that a person walking upon it might by making a false step, or being affected with sudden giddiness, or in the case of a horse or carriage way, by the sudden starting of a horse, be thrown into the excavation" (d). When the excavation is made at some distance from the way, so that the person falling into it would be a trespasser upon the defendant's land before he reached it, the case is different, and for an accident happening under such circumstances there is no remedy (e). The excavation must substantially adjoin the highway; it is not enough that the jury think it dangerous (f). In one case, where a canal company made a canal parallel to a public footway, but separated from it by an open strip of land twenty-four feet wide over which there was no right of way, it was held that the canal did not substantially adjoin the footpath, and that the company were consequently under no obligation to fence it (g). Under certain exceptional circumstances, however, the liability for not fencing may be independent of the question whether the source of danger substantially adjoins the high-road, as where the *locus in quo* is the site of a former public way which has been diverted, and no gate has been placed across the entrance to the old way so as to

(a) *Reg. v. Train*, (1862) 2 B. & S. 640.

(b) *Rex v. Ward*, (1836) 4 A. & E. 384.

(c) *Barnes v. Ward*, (1850) 9 C. B. 392. On the same principle it may be questioned whether, where yew trees grow on land immediately adjoining a highway, even though they do not project over the boundary, there is not a duty on the owner to fence them so as

to prevent cattle passing along the highway from browsing on them. See *per* Collins, J., in *Ponting v. Noakes*, (1894) 2 Q. B. p. 291.

(d) *Hardcastle v. South Yorkshire R. Co.*, (1859) 4 H. & N. p. 74.

(e) *Ibid.*

(f) *Hardcastle v. South Yorkshire R. Co.*, (1859) 4 H. & N. 67.

(g) *Binks v. South Yorkshire R. Co.*, (1862) 3 B. & S. 244.

indicate to passers-by that it has ceased to be a public thoroughfare (a); but the liability in such a case seems to be founded upon the implied representation that the *locus in quo* is a public road, and as such may be safely used.

The use of barbed wire as a fence to land so immediately adjoining a highway as to be likely to injure persons or animals lawfully using the highway is a nuisance (b). Barbed wire.

Again, it is a nuisance to leave upon the side of a public way (c), or even upon private land immediately adjoining the way (d), any unusual object calculated to frighten horses passing along the road, and if a horse shies at such object, and damage results, the party placing the object in such position will be responsible. The fact that other horses besides the plaintiff's have shied at the particular object complained of is admissible in evidence to show that the object was likely to inspire fear, and as such was a public nuisance (e). Objects causing fear to horses.

Although, if premises adjoining a highway be caused or permitted by their occupier to be in a condition dangerous to persons using the way, and such dangerous condition first came into existence after the way had been dedicated to the public, the occupier will be responsible for any damage that may result, yet if the existence of the source of danger was prior to or contemporaneous with the dedication of the highway, "the dedication must be taken to be made to the public, and accepted by them subject to the inconvenience or risk arising from the existing state of things" (f). Therefore where the defendant occupied a house and cellar in a public street, and the flap of the cellar projected slightly above the footway, and had so projected as long as living memory went back, and the plaintiff stumbled over the flap in the dark and was injured, the defendant was held not liable, on the ground that the jury ought to infer that the cellar had existed in that condition as long as the street, and that consequently there was nothing wrongful in maintaining it in such Dedication of highway subject to existing nuisance.

(a) *Hurt v. Taylor*, (1885) 14 Q. B. D. 268.

918.

(b) See the Barbed Wire Act, 1893, 56 & 57 Vict. c. 32.

(c) *Wilkins v. Day*, (1883) 12 Q. B. D. 110; *Harris v. Mobbs*, (1878) 3 Ex. D.

(d) *Brown v. Eastern & Midland R. Co.*, (1889) 22 Q. B. D. 391.

(e) *Ibid.*

(f) *Per Blackburn, J., Fisher v. Prowse*, (1862) 2 B. & S. p. 780.

condition (a). Again, a highway may be dedicated to the public subject to a pre-existing right of user by the occupiers of the adjoining land for the purpose of depositing goods on it (b); but the mere fact that they have been accustomed as far back as living memory extends to make such use of the highway does not raise a conclusive presumption that the commencement of the user was anterior to the dedication; such presumption as it affords is liable to be rebutted by the other circumstances of the case (c).

When dangerous character of highway precludes dedication.

It appears, however, that there is no evidence of dedication where the user of a way by the public is, owing to particular circumstances, necessarily subordinated to an anterior private use fraught with especial danger to passengers. Where, however, there is no such special danger an attempt to close a way subsequently to dedication will be restrained by injunction (d).

Defective gratings, coal-plates, &c., in pavement.

Where the area or basement of a house in a public street receives its access of light and air through a grating in the footway, such grating having been placed there contemporaneously with the dedication of the street, the occupier of the house is under no obligation to keep the grating in repair if it be permanently fixed in the pavement so that he has no control over it, for under such circumstances the grating forms part of the pavement of the highway, and the highway authority are bound to repair it just as much as any other part of the pavement. Consequently, if by reason of such a grating being defective a passer-by fall through, and sustain injury, the occupier of the house for the benefit of which the grating exists is not responsible (e). But if the grating be movable and under the control of the occupier of the house, as where it is used for the purpose of affording access to a cellar, he will be bound to repair it (f), and if he fail to do so will be liable for the consequences. The same rule applies to the case of an ordinary coal-plate (g).

(a) *Fisher v. Prowse*, (1862) 2 B. & S. 770. See too *Cooper v. Walker*, (1862) 2 B. & S. 773.

(b) *Per Cur.*, *Morant v. Chamberlin*, (1861) 6 H. & N. p. 564; *Le Nere v. Vestry of Mile End Old Town*, (1858) 8 E. & B. 1054.

(c) *Morant v. Chamberlin*, (1861) 6

H. & N. 541.

(d) *Att.-Gen. v. London & South Western Ry.*, (1905) 69 J. P. 110.

(e) *Robbins v. Jones*, (1863) 15 C. B. N. S. 221.

(f) *Guinnell v. Eamer*, (1875) L. R. 10 C. P. 658.

(g) *Pretty v. Bickmore*, (1873) L. R.

To the general rule that an action will lie for any special damage caused by a nuisance in a highway there is an exception where the nuisance arises from the non-repair of the road. As already pointed out (a), in rural districts the duty to repair the highways rests on the rural district council (b), in urban districts on the urban district council (c), in boroughs on the corporation or council of the borough, and in the Metropolis by virtue of the London Government Act, 1899 (d), on the Metropolitan borough councils, with the exception, in the last case, of the Thames Embankment, responsibility for the repair of which rests on the London County Council as successor to the Metropolitan Board of Works (e). Prior to the enactment of the Local Government Act, 1894, and the other statutes referred to above, the duty to repair the highways rested ordinarily upon the parish, and for a breach of that duty the only remedy was an indictment of the inhabitants. Probably this liability to indictment is now transferred to district councils (f) by s. 25 of the Local Government Act, but if this be not so the liability of the inhabitants still continues. Apparently no action for damage resulting from non-repair will lie against either the inhabitants (g), their surveyor (h), or the district council. And the same immunity from action which attaches to the surveyor at common law attaches also to the corporate highway authority, to whom under the London Government Act, 1899, or the Local Government Act, 1894, the duties of the surveyor are transferred. Where, therefore, in consequence of the wearing away of the roadway, some hard substance, such as a fireplug, which has been lawfully placed in the highway, and which was originally level with the surface of the highway, is caused to project above the surface so as to be a nuisance, a passenger who suffers injury by falling over it has no remedy by action against any one (i).

Nuisance
arising from
non-repair of
highway.

* C. P. 401; and see 57 Geo. III. c. cxxix., s. 7, M. A. Taylor's Act, 1817.

(a) p. 32.

(b) 56 & 57 Vict. c. 73, s. 25.

(c) *Ibid.* s. 21; and see Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 144.

(d) 62 & 63 Vict. c. 14.

(e) 51 & 52 Vict. c. 41, s. 40 (sub-s. 8).

(f) For indictment of a corporation,

C.T.

see *Reg. v. Corporation of Southport* (1901) 65 J. P. 184.

(g) *Russell v. Men of Devon*, (1788) 2 T. R. 667.

(h) *Young v. Davis*, (1862) 7 H. & N. 760.

(i) *Moore v. Lambeth Waterworks Co.*, (1886) 17 Q. B. D. 462.

Nor does it make any difference in this respect that the highway authority happen also in some other character to be owners of the projecting substance (a). Where, however, the foreign substance becomes a nuisance, not by reason of the soil wearing away, but by reason of itself becoming defective, its owners are responsible for any damage that may arise from its defective condition, and none the less because the owners happen to be the local authority who have charge of the repair of the roads (b).

In *Chapman v. Fylde Waterworks Co.* (c), the stopcock of a service pipe leading from the defendants' main to a house was protected by a guard-box let into the pavement, the hinge of which box got out of repair, whereby a passer-by tripped over it and was injured. The apparatus could not be repaired without breaking up the pavement. It was held that whether the apparatus was the property of the defendants or not, as they alone had power to break up the street for purposes of repairing the apparatus, they were responsible for the injury. And a similar responsibility, on the ground of misfeasance, as opposed to non-feasance, devolves on a local authority when, subsequently to breaking up a highway, they restore its surface in such a negligent and perfunctory manner as to render it, after a few days, dangerous for ordinary traffic (d).

Extra-ordinary traffic on highways.

In the case of nuisances created on public highways by extraordinary and excessively heavy traffic, it may be laid down as a general—though not universal (e)—proposition that an injunction will not be granted against the tortious user of a road when the authority responsible for its repair are guilty of contributory negligence by omitting to execute necessary

(a) *Thompson v. Mayor, &c., of Brighton*, (1894) 1 Q. B. 332, overruling *Kent v. Worthing Local Board*, (1882) 10 Q. B. D. 118.

(b) *White v. Hindley Local Board*, (1875) L. R. 10 Q. B. 219 (grid of sewer giving way); *Blackmore v. Vestry of Mile End Old Town*, (1882) 9 Q. B. D. 451 (flap of water-meter worn smooth and slippery).

(c) (1894) 2 Q. B. 599.

(d) *Bull v. Shoreditch Borough*, (1903)

67 J. P. 37; 1 L. G. R. 81, C. A.: affirmed *sub nom. Shoreditch Corporation v. Bull*, (1904) 90 L. T. 210, H. L.: and see *Clements v. Tyrone County Council*, (1905) 2 Ir. R. 542, C. A.: for cases of non-feasance see *Maguire v. Liverpool Corporation*, (1905) 1 K. B. 767, C. A.; *Holloway v. Birmingham Corporation*, (1905) 3 L. G. R. 878.

(e) *Hemsworth Rural Council v. Micklethwaite*, (1904) 68 J. P. 345 (action for damages).

repairs (a). Nor will an action for damages, for extraordinary user of a highway, lie under the Locomotive Acts (b) until the local authority have reinstated the road and executed the necessary repairs (c).

Where a vessel is sunk by accident in the tideway of a navigable river, the owner in order to prevent damage arising from other vessels striking against her is bound to give notice of the fact by lighting or buoying the spot where she has gone down (d). This done, his obligation is at an end, in all cases in which the vessel has sunk without any negligence on the part of those in charge of her; he is under no duty to remove her and prevent the continuance of the obstruction to the navigation. And even the obligation to give notice of the vessel's position continues only so long as the owner retains the possession and control of the vessel (e). If he sell her at the bottom of the water, the obligation passes to the purchaser (f); if he abandon her as not worth the expense of raising, the liability at common law ceases altogether (g). But under the Merchant Shipping Act, 1894 (h), the harbour or conservancy authority may remove the wreck if in such a position as to be a danger to the navigation, and sell it, and out of the proceeds of the sale reimburse themselves for the expenses of the removal; and this power of removal apparently imposes upon such authority an imperative duty to remove the obstruction as soon as notice is given of its existence (i). But under the Act, as at common law, an owner

Obstruction
to navigation
by sunken
vessel.

(a) *Att.-Gen. v. Scott*, (No. 2) (1905) 2 K. B. 160, C. A.; 68 J. P. 502.

(b) 24 & 25 Vict. c. 70; 41 & 42 Vict. c. 77; 61 & 62 Vict. c. 29.

(c) *Little Hulton Urban Council v. Jackson*, (1904) 68 J. P. 451.

(d) *The Snark*, (1900) P. 105, C. A.

(e) *Brown v. Mallett*, (1848) 5 C. B. 599.

(f) *White v. Crisp*, (1854) 10 Ex. 312.

(g) *Per Brett, L.J., The Douglas*, (1882) 7 P. D. p. 160; *Barraclough v. Brown*, (1897) A. C. 615, H. L. (E.). And see *Arrow Shipping Co. v. Tyne Improvement Commissioners*, (1894) A. C. 508. In the former case, Brett, L.J., indeed suggested that the owner of a ship which sinks through his negligence

is under no greater liability than if it had sunk without negligence. This view, however, is probably not correct. All the law lords in *Arrow Shipping Co. v. Tyne Improvement Commissioners*, (1894) A. C. 508, laid stress on the fact that the vessel in that case had sunk without any negligence, as did also Maule, J., in *Brown v. Mallet*, (1848) 5 C. B. 599. Presumably an owner who has negligently caused his ship to become a wreck and a nuisance to the navigation cannot get rid of his liability by abandonment.

(h) 57 & 58 Vict. c. 60, s. 530.

(i) *Per Cotton, L.J.*, (1882) 7 P. D. p. 160.

who has been in no default ceases to be the owner upon abandonment (a). And even where the owners do not abandon the wreck, if the harbour authorities undertake the duty of buoying and lighting, and neglect that duty, the owners are not responsible (b).

Doctrine of coming to nuisance exploded.

It was at one time thought, and there was much old authority for the proposition, that one who came to a private nuisance could not complain of it; that is to say, that if the nuisance had been in existence for ever so short a time before the plaintiff became possessed of the adjoining land, that was enough to justify its continuance. But this doctrine is no longer law (c). Nor does the fact that the matter complained of is a public nuisance preclude a particular person who is especially aggrieved from obtaining an injunction (d).

Prescriptive right to commit nuisance.

A right, however, to commit a private nuisance may perhaps be acquired by prescription as an easement (e), though it is submitted that this proposition is very doubtful, except where there has been such *laches* on the part of the individual complainant as will amount to personal acquiescence (f). Thus, it has been said, a man may acquire a right to obstruct the flow of the water in a natural watercourse (g), or, to impregnate the air with stenches from his candle factory (h), or to carry on a noisy trade to the nuisance of the adjoining owners (i) or to discharge rain-water from his eaves on to his neighbour's land (k). And by the common law a man might prescribe to pollute a non-navigable stream (l) so far as the pollution only affected the lower riparian

(a) *Arrow Shipping Co. v. Tyne Improvement Commissioners*, (1894) A. C. 508.

(b) *The Utopia*, (1893) A. C. 492.

(c) *Elliotson v. Feetham*, (1835) 2 Bing. N. C. 134. See also *Bliss v. Hall*, (1838) 4 Bing. N. C. 183.

(d) *Soltau v. De Held*, (1851) 21 L. J. Ch. 153.

(e) For rules in recent cases on easements by prescription, see *Clippons Oil Co. v. Edinburgh District Water Trustees*, (1904) A. C. 64; *Kilgour v. Gaddes*, (1904) 1 K. B. 457; *Ruscoe v. Grounsell*, (1903) 20 T. L. R. 5, C. A.; *Edinburgh Corporation v. N. British*

Ry., (1904) 6 F. 620, Ct. of Sess.

(f) *Gaunt v. Fynney*, (1872) L. R. 8 Ch. 8.

(g) *Murgatroyd v. Robinson*, (1857) 7 E. & B. 391.

(h) *Bliss v. Hall*, *supra*.

(i) *Elliotson v. Feetham*, *supra*; *Sturges v. Bridgman*, (1879) 11 Ch. D. 852.

(k) *Thomas v. Thomas*, (1835) 2 C. M. & R. 34; *Fay v. Prentice*, (1845) 1 C. B. 828.

(l) *Wright v. Williams*, (1836) 1 M. & W. 77; *Crosley v. Lightowler*, (1867) L. R. 2 Ch. 478.

proprietors. But by the Rivers Pollution Prevention Act, 1876 (a), it is made an offence to discharge any solid matter, or sewage, or any poisonous or noxious liquid from a mine or manufactory, into any stream whether navigable or not, and there is no saving in the Act of existing prescriptive rights to cause such pollution. The Act, however, does not wholly destroy such rights; the only remedies available against a person who at the date of the Act had a prescriptive right to pollute the stream are those provided by the Act, and subject to the restrictions therein contained (b). It does not therefore appear intended in any way to affect private rights and duties or to bear on the relation which riparian proprietors in their proprietary character bear to one another.

No right, however, can be acquired by user, however long, to use one's premises in such a manner as to amount to a public nuisance; "none can prescribe to make a common nuisance, for it cannot have a lawful beginning by licence or otherwise, being an offence at common law" (c).

It is in connection with this subject of prescription, as well as with that of the necessity of proving special damage, that the distinction between a public and a private nuisance becomes material. Whether a nuisance belongs to the one class or to the other seems to depend in some cases upon the number of the persons affected by the injurious act, irrespective of the character in which they are so affected; in other cases it seems to depend upon the character in which the persons are injured. A public nuisance has been defined to be "an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all her Majesty's subjects" (d). In the case of *Soltan v. De Held* (e), it was suggested, however, by Kindersley, V.C., that in order to constitute a public nuisance this further qualification must be added, that the thing complained of must in

Public
nuisance
defined.

(a) 39 & 40 Vict. c. 75.

Jac. 490.

(b) ss. 3, 6, on this point see *Midlothian C. C. v. Pumpherston Oil Co.*, (1904) 6 F. 387, Ct. of Sess.

(d) Criminal Code (Indictable Offences) Bill, 1879, s. 150; and Criminal Code Bill, 1880, s. 146.

(c) *Dewell v. Sanders*, (1618) Cro.

(e) (1851) 2 Sim. N. S. pp. 142-4.

its nature be an annoyance, in a greater or less degree, "to all persons who come within the sphere of its operation," and from that point of view he doubted whether a nuisance caused by the ringing of bells, however loud and incessant the ringing might be, could ever amount to a public nuisance on the ground that to persons at a distance the sound of the bells, so far from being an annoyance, might be an actual source of pleasure. It will be observed that in the Criminal Code Bills of 1879 and 1880 (a) the word "public" is used in two different senses. In the earlier part it means nothing more than a large number of private individuals; thus the "property of the public" there referred to does not mean public property but the property of numerous private persons. In this class of nuisances which affect the injured parties in their private capacity, to constitute the nuisance a public one the number affected must be large. The nuisance must affect the inhabitants of the neighbourhood generally. Whether it does so or not is in each case a question of degree. The reason why the erection of a building which obstructs the rights of a number of different owners cannot be a public nuisance (b) is that the owners so injured cannot be sufficiently numerous for this purpose. So, in an old case (c), where it was held that the new erecting of a pigeon-house was not a matter inquirable at the court leet, because it was not a common nuisance but only a nuisance to those whose corn the pigeons ate, the decision presumably proceeded upon the assumption that the persons injured would not be many (d). On the other hand, in the latter part of the above definition the word "public" is used in its ordinary acceptation, and in the case of the nuisances there dealt with (which seem to be confined to interferences with the right of free passage along a public highway whether by land or water, or with the right of fishing in navigable tidal water) the leading feature is not the number of the persons affected, but the

(a) Criminal Code (Indictable Offences) Bill, 1879, s. 150; and Criminal Code Bill, 1880, s. 146.

(b) *Per Kindersley, V.-C., Soltan v. De Held*, (1851) 2 Sim. N. S. p. 144.

(c) *Dewell v. Sanders*, (1618) Cro. Jac. 490.

(d) As that case was decided upon

demurrer to a declaration which did not state any special facts which would justify the above assumption, the correctness of the decision may be questioned. A large dove-cot in the immediate neighbourhood of allotment grounds might well be a public nuisance.

character in which they are so affected. Thus if a *cul de sac* leading only to a single house be a public highway, any obstruction to it will be a public nuisance none the less because the owner of the house is the only person who in fact uses the path. But as a nuisance of the former class will be at one and the same time both a private nuisance to the individual proprietors and a public nuisance to the neighbourhood generally, it may be that, if such a nuisance be continued for a period of twenty years, so far as the remedy by action is concerned, the right of the adjoining proprietors to complain of it may be gone, and that they may be left to their remedy by indictment; for, even though such proprietors may suffer a special damage over and above that suffered by the rest of the neighbourhood, they will suffer it as such proprietors, and it may be that by their acquiescence for the prescriptive period they will have conferred upon the party committing the nuisance the right to injure them in their proprietary character. But the point has never been decided.

A weir or mill-dam in a non-navigable river which prevents fish from running up the river is not a public nuisance, for it interferes with no right of the public, but is an injury only to the riparian owners: and such a weir or dam may be prescribed for even by an enjoyment commencing in modern times, for the provisions of Magna Charta and the other early statutes (a) prohibiting the erection of weirs apply only to navigable rivers (b).

Where a statute has authorised the doing of a particular act, or the user of land in a particular way, which act or user may involve a nuisance, all remedy whether by indictment or by action for injuries resulting therefrom is taken away, providing every reasonable precaution consistent with the exercise of the statutory powers has been taken to prevent the injuries occurring (c). Therefore, where a railway company are authorised by their Act to use locomotive engines upon their railway, the owners of land

Authorisation
of nuisance
by statute.

(a) 17 Ric. II. c. 9; 12 Edw. IV. c. 7.

(b) *Lord Leconfield v. Lord Lonsdale*, (1870) L. R. 5 C. P. 657; *Rolle v. Whyte*, (1868) L. R. 3 Q. B. 286.

(c) *Rex v. Pease*, (1832) 4 B. & Ad. 30. Apparently, however, in order to

avoid liability, evidence that every reasonable precaution has been adopted is necessary: *S. E. & Chatham Ry. v. London County Council*, (1901) 84 L. T. 632.

adjoining the line whose plantations, crops, or stacks are fired by sparks escaping from the engines cannot recover for such injuries if the company can prove that they took all reasonable measures to prevent the sparks from escaping (a). Subsequently to January 1st, 1908, under the provisions of the Railway Fires Act, 1905, railway companies, however, will be responsible, in sums not exceeding one hundred pounds, to the owners of land adjacent to their lines in event of trees, crops, or stacks, being fired by sparks from engines. It has been held that the occupiers of houses adjoining a railway, made under statutory powers, are deprived, in the absence of negligence, of their remedy for the nuisance of vibration caused by the passing trains (b), or the nuisance arising from the noise of cattle traffic in a station yard (c). The limits of deviation in a railway Act gives the company a discretion as to where they will fix their lines within those limits, and the fact that the nuisance to the plaintiff might have been lessened by fixing the line a few feet farther away does not in any way affect the company's exemption from liability (d). And if the company are given a power to purchase additional lands by agreement, after their compulsory powers have expired, in such situations as they may deem most eligible for the purposes of their undertaking, they are not to be bound in the selection of such lands by any consideration, whether one site will be less injurious to neighbouring landowners than another (e). But statutory authority to construct and work a tramway, notwithstanding that the keeping of horses is necessarily incidental to the use of a tramway, does not excuse a tramway company for a nuisance arising from noise made by the horses in their stables (f). Inasmuch as Canal Acts and Waterworks Acts expressly authorise the storage of large bodies of water, the undertakers under such Acts are not liable for damage caused by

(a) *Vaughan v. Taff Vale R. Co.*, (1860) 5 H. & N. 679; *Canadian Pacific Ry. v. Roy*, (1902) A. C. 220.

(b) *Hammersmith R. Co. v. Brand*, (1868-9) L. R. 4 H. L. 171.

(c) *London, Brighton, &c., R. Co. v. Truman*, (1885) 11 App. Cas. 45; see too *Attorney-General v. Metropolitan R. Co.*, (1894) 1 Q. B. 384.

(d) *Per Lord Halsbury*, (1885) 11 App. Cas. p. 52.

(e) *London, Brighton, &c., R. Co. v. Truman*, (1885) 11 App. Cas. 45; *National Telephone Co. v. Baker*, (1893) 2 Ch. 186.

(f) *Rapner v. London Tramways Co.*, (1893) 2 Ch. 588.

the escape of the water so stored, unless the escape be due to their negligence (a). If the intention on the part of the Legislature to authorise the act or user complained of is clear, the right of action for the injuries arising therefrom is taken away none the less because the statute gives no compensation (b), although in construing an Act conferring statutory powers a distinction should be drawn between one that is imperative and one that is merely permissive, there being a presumption in the latter case that the express legislative sanction was not intended to conflict with the common law rights of other members of the community (c).

Moreover, the statutory authority to commit a nuisance must, in order to afford a defence to the parties committing it, be express or necessarily implied (d). Therefore, where a railway Act authorised the construction and maintenance of a railway, but gave no express authority to use locomotive engines upon it, the undertakers were held not to be exempted from liability for damage arising from the escape of sparks from their engines notwithstanding that they took all reasonable precautions to prevent such escape (e). Nor do the various Acts authorising horseless traffic on the highways exonerate the owners of locomotives from liability for damage from sparks escaping from them (f). So an Act which authorised the formation of district asylums for the care and cure of sick and infirm poor, and made the poor rates liable for the expense, was held not to authorise the building of a small-pox hospital in such a place as to cause a nuisance to the adjoining owners, the intention of the Legislature being, not to take away private rights by authorising the doing of

(a) *Whitehouse v. Birmingham Canal Co.*, (1858) 27 L. J. Ex. 25; *Dunn v. Birmingham Canal Co.*, (1872) L. R. 8 Q. B. 42; *Blyth v. Birmingham Waterworks Co.*, (1856) 11 Ex. 781; *Green v. Chelsea Waterworks Co.*, (1894) 10 Times L. R. 259. To the above rule, however, an exception exists in the case of damages to mines. See 10 Vict. c. 17, s. 27.

(b) *Hammersmith R. Co. v. Brand*, (1868-9) L. R. 4 H. L. 171; *London, Brighton, &c., R. Co. v. Truman*, (1885) 11 App. Cas. 45.

(c) *Canadian Pacific R. Co. v. Parke*, (1899) A. C. 535, P. C.; S. P. *Jordeson v. Sutton, &c. Gas Co.*, (1898) 2 Ch. 614.

(d) *Ogston v. Aberdeen District Tramways Co.*, (1897) A. C. 111.

(e) *Jones v. Festiniog R. Co.*, (1868) L. R. 3 Q. B. 733.

(f) *Powell v. Fall*, (1880) 5 Q. B. D. 597. See too the Explosives Act, 1875, 38 Vict. c. 17, compliance with the provisions of which will presumably not take away rights of action for damage caused by an explosion.

that which without the statute would have been actionable, but merely to charge on the rates the expense of maintaining hospitals under circumstances under which they might lawfully have been maintained at common law (a). So, too, an Act which imposes an obligation on a local authority to repair the highways does not thereby authorise them to use for that purpose steam-rollers of such a weight as to crush gas or other pipes lawfully laid under the roadway (b). And *a fortiori* this rule applies where damage results from an excessive use of a highway by a person acting without statutory authority (c). But, on the other hand, there is no duty laid upon a local authority, when effecting a permanent reduction in the level of a highway, to relay existing water pipes thereunder, so as to maintain their former relative distance beneath the surface (d). In *Sadler v. South Staffordshire, &c., Tramways Co.* (e) the defendants, a company with statutory powers, had running powers over the line of another company likewise made under statutory powers. Through a defect in this line a car of the defendant company left the rail and injured the plaintiff. It was held that the defendants were responsible to the public for running their cars over a line which had been negligently permitted to be in an unsafe condition (f).

However, in *Hawley v. Steele* (g), Jessel, M.R., was strongly of opinion that an Act of Parliament, which provided that all lands, which should thereafter be taken for the use of the Ordnance Department and for the defence of the realm, should vest in certain officers in trust for her Majesty and for the service of the said department, impliedly authorised such officers to use any land which they might so acquire for any reasonable military purpose, and that, however great a nuisance the use of the land

(a) *Metropolitan Asylum District v. Hill*, (1881) 6 App. Cas. 193; but see *Attorney-General v. Nottingham Corporation*, (1904) 1 Ch. 673; *Attorney-General v. Rathmines & Pembroke Hospital Board*, (1904) 1 Ir. R. 161, C. A.

(b) *Gas Light & Coke Co. v. St. Mary Abbott*, (1885) 15 Q. B. D. 1. For liability for personal damages under such circumstances, see *Driacoll v.*

Poplar Board of Works, (1898) 62 J. P. 40.

(c) *The Mayor, &c. of Chichester v. Foster*, (1905) 22 T. L. R. 18.

(d) *Southwark & Vauxhall Water Co. v. Wandsworth District Board of Works*, (1898) 2 Ch. 603.

(e) (1889) 23 Q. B. D. 17.

(f) *Ogston v. Aberdeen District Tramways Co.*, (1897) A. C. 111.

(g) (1877) 6 Ch. D. 521.

for such purposes might cause to the owners of the adjoining land, the latter were wholly without remedy.

It has, however, been held in the recent case of *Blundell v. The King* (a), that upon a compulsory sale of land to the Crown, the owner is entitled to compensation for loss of amenity in respect of adjacent property.

But even in cases in which the nuisance complained of is *primâ facie* authorised by statute, the party causing it will be liable if he does not take reasonable precautions to prevent damage resulting therefrom (b). Though exempt from the absolute liability which would attach to a person not acting under statutory powers, he still is liable if he exercise his powers negligently. Therefore where a local board were authorised by statute to construct and place a landing-stage in a navigable river, and, for the purpose of keeping such stage in position, to place anchors out in the river which had the effect of obstructing to some extent the navigation, they were nevertheless held liable for injuries caused to a vessel by reason of its having come into collision with one of the anchors, they not having by means of proper buoys sufficiently indicated the position of the anchor to persons navigating the river (c). A water company, though in maintaining their works they may be acting under statutory powers, are bound to take reasonable precautions to provide against the consequences of an ordinary frost (d). But the omission to take precautions against the possible consequences of an extraordinary frost is not negligence. Therefore where the plaintiff's premises were flooded by water escaping from a water company's main, by reason of a frost of an unprecedented severity having penetrated to an unusual depth in the soil and there frozen the water in a pipe, whereby a fire-plug was forced out of its position, the company were held not liable (e). So, too, a gas company are bound to maintain a reasonable inspection of their mains and pipes so as to enable them to detect any

Negligent use
of statutory
powers.

(a) (1905) 92 L. T. 53.

(1873) L. R. 9 C. P. 62.

(b) *Vaughan v. Taff Vale R. Co.*, (1860) 5 H. & N. 679; and see *Ogston v. Aberdeen District Tramways Co.*, (1897) A. C. 111.

(d) *Steggles v. New River Co.*, (1865) 13 W. R. 413.

(e) *Blyth v. Birmingham Waterworks Co.*, (1856) 11 Ex. 781.

(c) *Joliffe v. Wallasey Local Board*,

leakage of gas which may occur through fracture or imperfection in the pipes, and to repair any defective pipe with all speed; and if owing to a neglect to keep up such a reasonable inspection an explosion occurs, they will be responsible for any loss occasioned thereby (a). So, too, a railway company are bound from time to time to inspect their bridges and see that the brickwork is in good order and all the bricks well secured; and if owing to neglect to make such inspection a bridge is allowed to get out of repair and a brick falls from it on to a passer-by and injures him, they will be liable, although the bridge may have been erected under statutory powers (b). So where a railway company make an embankment under their Act they are bound to provide proper flood openings to prevent injury to adjoining lands from flood water being penned back (c). It is, moreover, obligatory on them strictly to conform to the terms of the Act of Parliament from which they derive their powers; and in default an action lies against them, without proof of injury to the public (d). A water or gas company who are empowered to take up the pavement of a street for the purpose of laying down pipes are bound to exercise care to prevent injury arising therefrom to passers-by (e). Persons who, while acting in the exercise of their statutory powers, are guilty of negligence, are liable for damage resulting from such negligence none the less because they do not derive any personal benefit from the exercise of their powers (f).

Who may
sue for a
nuisance—
Assignee of
land affected.

Where a person creates upon his premises a permanent source of nuisance to the adjoining land, as where he builds a house so as to obstruct ancient lights, or with overhanging eaves which cause the rainwater to drip on to his neighbour's house, or where he stops a river so that the adjoining land is flooded, the assignee of the premises which are damaged by the nuisance, whether he be lessee for a term of years (g), or purchaser in

(a) *Mose v. St. Leonards Gas Co.*, (1864) 4 F. & F. 324.

(b) *Kearney v. London, Brighton, &c., R. Co.*, (1871) L. R. 6 Q. B. 759.

(c) *Lawrence v. Great Northern R. Co.*, (1851) 16 Q. B. 643.

(d) *Attorney-General v. L. & N. W. R. Co.*, (1900) 1 Q. B. 78, C. A.

(e) *Drew v. New River Co.*, (1834) 6

C. & P. 754; *Holliday v. National Telephone Co.*, (1899) 2 Q. B. 392.

(f) *Mersey Dock Trustees v. Gibbs*, (1864-5) L. R. 1 H. L. 93; *Hill v. Tottenham Urban District Council*, (1898) 79 L. T. 495; *Shoreditch Corporation v. Bull*, (1904) 90 L. T. 210. H. L.

(g) Rolle Ab. Nuisance, K. 2.

fee (a), or devisee (b), may sue in respect of a continuance of the nuisance, notwithstanding that the original creation thereof was before he had any interest in the soil (c).

In the case of a public nuisance such as a trespass on the highway by building out beyond the adjacent, or admitted, building line, or generally for the breach of any public statutory duty, a right of action vests in the Attorney-General, to restrain the prospective breach, or to abate the nuisance, if persisted in, by mandatory injunction.

Action by
Attorney-
General in
case of public
nuisance.

This action is generally initiated at the relation of the Local Authority who in cases of importance should put the Attorney-General in motion to exercise the authority vested in him for the protection of the public (d).

Apparently, however, minor infringements of public rights hardly justify the intervention of the Attorney-General, it being stated by the Lord Chancellor (Halsbury) in *The London County Council v. The Attorney-General*, that (e) "It may well be . . . that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of Law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not."

A reversioner may sue for any wrongful act of a permanent nature which would tend either to destroy the evidence of the fact that the adjoining land was burdened with a servitude in his favour, or to establish evidence against him that his land was burdened with a corresponding servitude in favour of the adjoining land (f). It is not enough that the act would, if continued,

Reversioner.

(a) *Penruddock's case*, (1597) 5 Rep. 100 b.

(b) *Some v. Barwisk*, (1609) Cro. Jac. 231.

(c) And see *per* Parke, B., *Thompson v. Gibson*, (1841) 7 M. & W. p. 461.

(d) *Attorney-General v. Wimbledon House Estate Co., Ltd.*, (1904) 2 Ch. 34.

(e) (1902) A. C. 165, at p. 168.

(f) As to when reversioner may sue for a trespass see above, p. 354.

be evidence against the reversioner on a claim of right, but it must also be of such a permanent nature as necessarily to lead to the presumption that it will be so continued (a). Any act will be of a sufficiently permanent nature within the meaning of this rule if its effects will in the ordinary course of things continue unless some further positive act be done to prevent their continuance. Thus it has been held that a reversioner is entitled to sue for the wrongful erection of a hoarding or other obstruction against his ancient light though it was possible that the obstruction might be removed before his estate fell into possession (b). It was, however, decided in *Cooper v. Crabtree* (c), that the erection of a hoarding, not being a structure of such a permanent character as to injure the reversion, could not be restrained by injunction. But a declaration by a reversioner that the defendant had locked a gate across a way to which the plaintiff was entitled for his tenants, and that thereby the plaintiff was injured in his reversionary estate, has been held sufficient (d). So, too, where the plaintiff was entitled for his tenants to a right of access to his wharf and siding from the railway of the defendants, and the defendants, with the intention of preventing such access, left large quantities of rolling stock lying continually across the mouth of the siding, the obstruction thereby caused was considered sufficiently permanent to enable the plaintiff to sue for an injury to his reversionary interest (e), on the ground that the carriages could not roll themselves away (f). So, too, where the adjoining owner builds a house with projecting eaves whereby the rainwater from the house is discharged upon the plaintiff's soil, the plaintiff may sue as for an injury to his reversion by reason that the enjoyment of the eavesdropping would furnish some evidence against him of a right to its continuance (g).

In *Simpson v. Savage* (h) a nuisance caused by the erection of

(a) See *per* Maule, J., *Kidgill v. Moor*, (1850) 9 C. B. p. 372.

(b) *Shadwell v. Hutchinson*, (1831) M. & M. 350; *Metropolitan Association v. Petch*, (1858) 5 C. B. N. S. 504.

(c) (1882) 20 Ch. D. 589, C. A.

(d) *Kidgill v. Moor*, (1850) 9 C. B. 364.

(e) *Bell v. Midland R. Co.*, (1861) 10 C. B. N. S. 287.

(f) *Per* Willes, J., *ibid.* p. 302.

(g) *Tucker v. Newman*, (1839) 11 A. & E. 40.

(h) (1856) 1 C. B. N. S. 347; and see *Mumford v. Oxford, Worcester, &c. R. Co.*, (1856) 1 H. & N. 34.

workshops and a forge, which produced noise and smoke, was held to give no cause of action to the reversioner of the adjoining premises, for though the erection of the forge and workshops was necessarily of a permanent character, the mode of user, in which the nuisance consisted, was not, and the Court assumed that the premises might have been used in such a way as not to produce a nuisance (a). But where the defendant builds a large factory and fills it with noisy machinery which can only be used in such a way as to cause a nuisance to the neighbouring property, the Court will hold the nuisance to be sufficiently permanent to satisfy the rule (b). Indeed, the object of the rule itself as to permanence is not very obvious; it is not easy to see why, if the probability of the defendant continuing the state of things which will furnish evidence against the reversioner can be established by other means, as for instance by a declaration of intention to continue it, that should not of itself entitle the reversioner to sue. Not to allow him so to do might cause great hardship, for evidence which might be easily met at the outset may become very difficult to rebut after a long term of years; and especially would this hardship exist where the repetition of the acts complained of would not merely furnish evidence against the owner of the future estate, but would under the provisions of the Prescription Act create an absolute title against him, as for instance where a way is enjoyed for forty years while the servient tenement is in the possession of a tenant for life. In such case after the expiry of the forty years the remainderman would be bound (c), a result which would be eminently unjust unless he were allowed to protect himself during the period by bringing an action before his estate fell into possession.

Whether a reversioner can bring an action to prevent his land being burdened in favour of the defendant's with a negative easement such as that of light has never been expressly decided. Since the passing of the Prescription Act, 1832, the opening of new windows, if the enjoyment be uninterrupted for the statutory period, confers an absolute right to the light, and operates to

(a) But see *Colwell v. St. Pancras* Ch. 287, 317.

Borough Council, (1904) 1 Ch. 707.

(c) *Symons v. Leaker*, (1885) 15

(b) *Meux's Brewery Co. v. City of* Q. B. D. 629.

London Electric Lighting Co., (1895) 1

restrict the adjoining owner's power of using his land for building purposes. But it would be very unjust that a reversioner of the adjoining land, who was unable to obtain the termor's consent to a physical obstruction of the defendant's window-lights, should be powerless to prevent the accrual of a right which might turn out to be most injurious to his property. In many cases, indeed, there are *dicta* to be found to the effect that the opening of new windows is in law an innocent act (a), but in all of them apparently the judges were contemplating an enjoyment had while the owner of the fee of the servient tenement was in possession, and consequently had the power, if he chose to exercise it, of physically obstructing the light, and must not be taken to have had in view the hardship which might result from refusing a right of action to a reversioner. However, the fact that no such action has ever yet been brought is too strong an argument against the existence of the right of action to be got over, and it must be assumed that, notwithstanding the objection on the ground of hardship, the opening of new windows is not a ground of action even at the suit of a reversioner.

Local
authority
blocking
lights.

In the recent case of *The Mayor and Corporation of Paddington v. The Attorney-General* (b), it was held by the House of Lords that a local authority in whom a disused burial ground was vested as an open space for the use of the public were empowered to erect a hoarding upon such open space for the purpose of preventing an adjoining landowner from acquiring a right to the access of light over it.

Who are
liable to be
sued for a
nuisance.

In dealing with the question of the parties who are liable for a nuisance existing upon private property a distinction is to be drawn in the first place between those cases in which the damage is caused by the physical condition of the premises themselves and those in which it is caused by the particular mode of their user; and, secondly, with regard to the former class of cases a further distinction is to be drawn between those cases in which the physical condition complained of is the result of a wrongful act of commission and those in which it is due to a wrong of omission.

(a) *Tapling v. Jones*, (1865) 11 H. L. C. 290; *per* Bayley, J., *Cross v. Lewis*, (1824) 2 B. & C. p. 689; *per* Lord Selborne, *Angus v. Dalton*, (1881) 6 App. Cas. p. 797.
(b) (1905) 22 T. L. R. 55, H. L.

1. Where the nuisance complained of is caused by the physical condition of the premises and that condition is the result of an act of commission, as for instance where a building is erected so as to obstruct the plaintiff's ancient lights (*a*) or market (*b*), the party who originally created the nuisance remains liable for all the damage flowing from its continuance, even though by reason of his not being in possession of the premises he is unable to prevent that continuance. "If a wrong-doer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it" (*c*).

Nuisance caused by physical condition of premises resulting from act of commission.

Thus if the builder of a house which causes an obstruction of the kinds above mentioned lease it to a tenant (*d*) or sell it to a purchaser in fee (*e*), an action will lie from time to time against the builder for continuing the obstruction notwithstanding the lease or sale. Whether in the case of a lease the lessee would also be liable is not quite clear, but presumably he would. In *Ryppon v. Bowles* (*f*) Lord Coke inclined to the view that he would not, on the ground that it would be waste in him to alter the structure, but the rest of the Court seem to have doubted, and no judgment was given on the point. In the latter case of *Roswell v. Prior*, Lord Holt denied Lord Coke's view to be law, and maintained that, whether it were waste in the lessee to abate the nuisance or not, he would be liable for its continuance, for it was his "fault to contract for an interest in land on which there was a nuisance" (*g*). In the case of a sale it is clear that, after notice to abate, the purchaser would be liable as well as the vendor (*h*).

And not only does the erector of a nuisance of the above character remain liable for its continuance where it was originally erected for his benefit upon his own land, but the same principle applies to a contractor who is employed to erect it on the land of third persons (*i*).

(*a*) *Roswell v. Prior*, (1701) 12 Mod. 635.

(*b*) *Thompson v. Gibson*, (1841) 7 M. & W. 456; and see *Wilcox v. Steel*, (1904) 1 Ch. 212.

(*c*) *Per Cur.*, *Roswell v. Prior*, (1701) 12 Mod. p. 639.

(*d*) *Roswell v. Prior*, *supra*.

(*e*) *Ibid.* p. 639.

(*f*) (1615) Cro. Jac. 373.

(*g*) (1701) 12 Mod. p. 640.

(*h*) *Penruddock's case*, (1597) 5 Rep. 100 b.

(*i*) *Thompson v. Gibson* 1841) 7 M. & W. 456.

The purchaser of land with an existing nuisance upon it cannot be sued for continuing the nuisance until after a request made to abate it (a).

Nuisance caused by physical condition of premises resulting from wrong of omission.

2. Where the physical condition of the premises complained of is the result of a wrong of omission, as where the owner of a house suffers it while in his possession to get into a ruinous state so that portions of it are likely to fall upon the adjoining land and do damage (b), or where the owner of a coal-plate (c) or grating (d) in the footway of a public street permits it while in his possession to be in such an insecure condition as to be dangerous to persons using the street, such owner cannot rid himself of liability for the possible consequences of his breach of duty by merely letting the premises to tenants without taking a covenant from the tenants to repair them. If he lets them without such a covenant, both landlord and tenant are liable for any damage arising from the condition of disrepair existing at the date of the lease. And the liability of the lessor in such a case is independent of the question whether at the time of the lease he had or had not any actual knowledge of the state of disrepair (e). Apparently, however, if the defective grating, or other article of a cognate character, was immovably fixed in position contemporaneously with the dedication of the street, it forms such an integral part of the highway as to shift the burden of responsibility from the owner or occupier of the premises on to the local authority (f).

It has been said that if while premises are on lease a party buys the reversion he is liable for any nuisance existing upon the premises for which the original reversioner would have been liable, although he has no opportunity of putting an end to the tenant's interest or abating the nuisance (g); but the correctness of this proposition may well be doubted, for the mere receipt of

(a) *Penruddock's case*, *supra*, p. 417.

(b) *Todd v. Flight*, (1860) 9 C. B. N. S. 377; *Chauntler v. Robinson*, (1849) 4 Ex. 163.

(c) *Pretty v. Bickmore*, (1873) L. R. 8 C. P. 401.

(d) *Guinnell v. Eamer*, (1875) L. R. 10 C. P. 658.

(e) See *per Erle, C.J., Gandy v.*

Jubber, (1864) 5 B. & S. p. 492, where he so states the rule without any qualification.

(f) *Robbins v. Jones*, (1863) 13 C. B. N. S. 221.

(g) *Per Littledale, J., Rex v. Pridy* (1834) 1 A. & E. p. 827. He cites no authority for the proposition.

rent does not amount to a continuance of the nuisance (*a*). It is, however, the common law duty of an owner of property in possession absolutely to prevent it from becoming a public nuisance; consequently the fact that he has exercised, though ineffectually; all reasonable diligence in abating the nuisance will not protect him from liability (*b*).

On the other hand, if premises are leased for a term of years which were in a sufficient state of repair at the time of the lease, and are subsequently suffered to get out of repair during the lease, for any damage arising therefrom to third persons, in the absence of a covenant by the lessor to repair, the lessee alone is liable (*c*). Covenant to repair.

Where premises are let to a tenant from year to year, the fact that they are allowed by the tenant to get out of repair does not apparently impose on the landlord the obligation of determining the tenancy by notice to quit, and omission to give such notice does not amount to a reletting so as to render him liable for continuance of a nuisance arising from the disrepair (*d*), though at one time it was thought otherwise (*e*). And the same rule applies to the case of a tenancy from week to week (*f*).

Where premises while in the occupation of a tenant are in such a state of disrepair as to cause a nuisance, then, whether that state of disrepair existed at the time of the letting or only arose during the tenancy, if either landlord or tenant covenanted with the other to repair, the party so covenanting alone is liable. If the lessor has covenanted with the tenant to repair, he and not the tenant is liable for any injury sustained by a stranger during the lease from the premises having got out of repair (*g*). But in the absence of an express covenant, a landlord is not liable to his tenant for personal expenses caused by the defective condition of

Where disrepair amounts to nuisance.

(*a*) *Gandy v. Jubber*, (1864-5) 9 B. & S. 15.

(*b*) *Attorney-General v. Tod Heatley*, (1897) 1 Ch. 560, C. A.

(*c*) *Cheetham v. Hampson*, (1791) 4 T. R. 318; *Russell v. Shenton*, (1842) 3 Q. B. 449.

(*d*) See the undelivered judgment of the Exch. Ch. in *Gandy v. Jubber*, (1864-5) 9 B. & S. 15.

(*e*) See *per* Littledale, J., *Rex v.*

Peddy, (1834) 1 A. & E. p. 827; and *Gandy v. Jubber*, in the Q. B., (1864) 5 B. & S. 78.

(*f*) *Bowen v. Anderson*, (1894) 1 Q. B. 164, disapproving *Sandford v. Clarke*, (1888) 21 Q. B. D. 398, *contra*.

(*g*) *Payne v. Rogers*, (1794) 2 H. Bl. 350. See too *Rich v. Basterfield*, (1847) 4 C. B. 783; and *per* Lopes, J., *Nelson v. Liverpool Brewery Co.*, (1877) 2 C. P. D. p. 313.

the demised premises (a). And a covenant by the tenant to do all, except certain specified repairs, does not impose any liability upon the landlord during the lease to do the excepted repairs; therefore, where an owner let a house in good repair at the time of the letting, the tenant covenanting to do all necessary repairs to the premises except main walls, roof, and main timbers, and the owner made no agreement to repair the excepted portions, and by reason of a part of the main walls being out of repair a chimney fell down and injured the plaintiff, it was held that the owner was not liable (b); the lessee in such case, though under no obligation as towards his landlord to do the repairs, being as towards third persons responsible for the non-repair.

On the other hand, a covenant by the lessee to repair will apparently exonerate the lessor from the consequences of a nuisance arising from the disrepair of the premises at the date of the lease, even though at such date the lessor had full knowledge of the disrepair (c).

This rule, that a private agreement between landlord and tenant as to the repairs can determine the question as to which of them is responsible to third parties for a nuisance arising from disrepair, a rule which must be regarded as somewhat anomalous, is said to be founded upon the desirability of avoiding circuitry of action (d).

Sale of premises in state of disrepair.

Whether an owner who sells to a purchaser premises which by his neglect he has permitted to be in a dangerous condition can by such sale get rid of his liability for future damage arising from that condition, whether, that is to say, such sale will operate in the same way as the taking of a covenant from the tenant in the case of a lease, there is no authority to show; but it is presumed that it will do so, and that upon the sale, without more, the liability will be transferred to the purchaser (e). And if this be so, then a person who excavates his land for mining or other purposes, and then sells it in that condition, will by the fact of sale discharge himself from liability to the owners of the

(a) *Tredway v. Machin*, (1904) 91 T. 310.

(b) *Nelson v. Liverpool Brewery Co.*, (1877) 2 C. P. D. p. 311.

(c) *Per Brett, J., Gwinnell v. Eamer*, (1875) L. R. 10 C. P. p. 661.

(d) *Payne v. Rogers*, (1794) 2 H. Bl. p. 351.

(e) And see *Attorney-General v. Tol Heatley*, where the defendant's responsibility was transferred to the succeeding owner, (1897) 1 Ch. 560.

adjoining land for any subsidences occurring subsequently to the date of the sale, the excavation itself not being a wrongful act so as to bring the case within the rule of *Roswell v. Prior* (a), and the only breach of duty committed by the vendor being a wrong of omission in neglecting to substitute artificial support in lieu of that taken away. It is also apprehended that a similar transfer of liability would take place in the case of a devolution upon heir (b) or devisee. The general proposition, as stated above, must, however, be taken with some reservation, it having been held in the modern case of *Hall v. Duke of Norfolk* (c) that an owner in possession is not responsible for a subsidence of land primarily caused by the acts of his predecessor in title; and further that, under such circumstances, an original owner by parting with the property does not thereby divest himself of responsibility for the damage occasioned by such subsidence. Nor can the Statute of Limitations be pleaded in such cases, the right of action accruing from the date of the subsidence, and not from the date of the act by which such subsidence was originally caused (d).

3. Where the nuisance arises, not from the physical condition of the premises themselves, but from the mode of their user, then if the premises are, at the time of the nuisance arising, in the occupation of a tenant, the better opinion seems to be that the tenant is liable and the landlord is not, even though the latter may have contemplated the premises being used in the very way which brings about the state of things complained of. The case of *Rex v. Pedly* (e) no doubt gives countenance to the opposite view. There the indictment charged that the defendant erected certain privies and a sink near a highway, and caused persons to resort to and use them, and thereby create such a stench as amounted to a nuisance. On proof that the defendant was landlord of certain houses which together with the privies and sink were let to tenants who used them in the manner stated,

Nuisance
caused by
mode of user
of premises.

(a) (1701) 12 Mod. 635.

(b) Lord Blackburn in *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. p. 144, thought otherwise, but he dissented from the judgment of the majority.

(c) (1900) 2 Ch. 493; and see *Green-*

well v. Low Beechburn Coal Co., (1897) 2 Q. B. 165.

(d) As to the method of assessing damages in such cases, see *Tunnickliffe and Hampson v. West Leigh Colliery Co.*, (1905) 74 L. J. Ch. 649.

(e) (1834) 1 A. & E. 822.

he was held liable, although neither privies nor sink were a nuisance apart from their user by the tenants. But the grounds of the decision are not very clear; and in the later case of *Rich v. Basterfield* (a), the Court observed that if *Rex v. Peddy* "is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance by the manner in which he uses the premises demised, we think it goes beyond the principle to be found in any previously decided cases, and we cannot assent to it." In this last case an action was held not to lie against the landlord of a house under lease to a tenant for a nuisance caused by the chimneys smoking to the annoyance of the adjoining occupier, on the ground that the chimneys *per se* were not a nuisance, and the lighting the fires which was purely optional on the part of the tenant was in no sense the act of the landlord. The Court laid it down that "if a landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord cannot be made responsible for the acts of the tenant" (b). No doubt it is in one sense optional with the tenant whether he uses the privies or fireplaces, but practically it is not. The Court, however, declined to recognise any distinction on that score. "To bring liability home to the owner the nuisance must be one which is in its very essence and nature a nuisance at the time of the letting, and not merely something which is capable of being thereafter rendered a nuisance by the tenant" (c).

Occupier
liable for
nuisance
committed on
his premises
with his
permission.

Where a person permits third parties to commit a nuisance upon premises of which he himself is in occupation at the time of the nuisance committed, the occupier permitting such acts of

(a) (1847) 4 C. B. 783.

(b) But see the case of *Harris v. James*, (1876) 45 L. J. Q. B. 545, where the lessor of a lime-kiln was held liable for a nuisance caused by the smoke of the kiln, on the ground that such nuisance was a necessary consequence of the use of the kiln in the mode contemplated by the demise. The

case of *Rich v. Basterfield* was there criticised and spoken of as a case "of excessive refinement."

(c) *Per* Crompton, J., *Gandy v. Jubber*, (1864) 5 B. & S. p. 87; but see *Sanders-Clark v. Grosvenor Mansions Co. and D'Allessandri*, (1900) 2 Ch. 373.

nuisance is responsible therefor, notwithstanding that they be not done on his behalf or for his benefit (a). But mere omission by the occupier of premises to abate a nuisance created thereon without his authority and against his will does not amount to a continuance of it by him so as to render him responsible for it (b).

(a) *Per Cur.*, *Rich v. Basterfield*, (1847) 4 C. B. p. 804; and see *White v. Jameson*, (1874) L. R. 18 Eq. 303. (b) *Saxby v. Manchester & Sheffield R. Co.*, (1869) L. R. 4 C. P. 198.

Canadian Notes to Chapter XIV.

NUISANCE.

NUISANCES TO STREAMS (a).

The Ontario cases bearing on the various infringements of right in relation to water and watercourses are much too numerous for insertion here (b).

An injury to a watercourse is considered an injury to a permanent right (c). Choking the stream with sawdust is such an injury (d).

NUISANCE TO STREAM: INJURY BY DAM (e).

The owner of land is entitled to damages for injury caused by a neighbouring lower proprietor who dams back the water and overflows the upper proprietor's land (f).

POLLUTION OF WATER (g).

A person throwing noxious water into Lake Ontario or any other navigable water is liable both to an indictment and to a private action at the suit of any individual distinctly and peculiarly injured thereby (h).

(a) P. 381, *supra*.

(b) See cases in Dig. Ont. Cas. Law, pp. 7292-7363, under title "Water and Watercourses."

(c) *Applegath v. Rhymal*, Tay, 590.

(d) *Mitchell v. Barry*, 26 U. C. R. 416.

(e) P. 381, *supra*.

(f) *Smith v. Scott*, 1 Kerr, 1, effect of

licence considered. Cf. *Lawlor v. Potter*, 1 Han. 328, increased overflow; *Connors v. McLaggan*, 2 Kerr, 446, effect of Stat. of Limitations; *Phillips v. St. John Water Co.*, 4 All. 24, non-repair of dam.

(g) P. 382, *supra*.

(h) *Watson v. City of Toronto Gas Light and Water Co.*, 4 U. C. R. 158.

NUISANCES PRODUCTIVE OF PERSONAL DISCOMFORT (a).

Ontario. The erection of stables may or may not be considered a nuisance, although shown to affect the neighbouring premises (b).

New Brunswick. It is sufficient to constitute a private nuisance arising from offensive odours that material discomfort and annoyance are occasioned for the ordinary purposes of life according to the ordinary mode and custom of living in this country (c).

UNREASONABLE NOISES (d).

Ontario. The playing of a band in an adjoining skating rink disturbing the week-day services in a church was held to constitute a nuisance (e).

ERECTION OF HOSPITAL (f).

Ontario. One municipality may be restrained from erecting a small-pox hospital within another municipality (g).

IMPURITY OF AIR IN A TOWN (h).

Ontario. While residents of a city cannot insist on the complete immunity from all interference with their right to uncontaminated air which they might have in the country, an occupant of city property cannot justify throwing into the air in and around his neighbour's house any impurity which there are known means of guarding against (i).

OBSTRUCTIONS TO HIGHWAY (k).

Ontario. Even the corporation of the municipality cannot obstruct its own streets (l).

BARBED WIRE (m).

Ontario. It has been held that barbed wire fences constructed by a railway company upon an ordinary country road could not be treated as a nuisance (n).

(a) P. 388, *supra*.

(b) See *Lawrason v. Paul*, 11 U. C. R. 534, held not sufficient nuisance to support an action by reversioner although rent lowered in consequence; *Drysdale v. Dugas*, 26 S. C. R. 20, owner of livery stable liable in damages.

(c) *Per* Palmer, J., in *McIntosh v. Caritte*, Stev. Dig. 3rd ed. p. 654.

(d) P. 388, *supra*.

(e) *Churchwardens of St. Margaret's v. Stephens*, 29 O. R. 185.

(f) P. 390, *supra*.

(g) *Township of Elizabethtown v. Town of Brockville*, 10 O. R. 372.

(h) P. 390, *supra*.

(i) *Cartwright v. Gray*, 12 Gr. 399.

(k) P. 397, *supra*.

(l) *Cline v. Town of Cornwall*, 21 Gr. 129, erection of weigh-scale at corner of principal street.

(m) P. 399, *supra*.

(n) *Hillyard v. Grand Trunk R. W. Co.*, 8 O. R. 583.

DEDICATION OF HIGHWAY SUBJECT TO EXISTING NUISANCE (a).

The right of the public to the free and unobstructed use of a **Canada.** street cannot be taken away by the existence of an obstruction at the time when the street is dedicated (b).

ACCESS TO CELLAR THROUGH PAVEMENT (c).

The case of *Ewing v. Hewitt* (d) apparently leads to a different **Ontario.** result from the English citations. The owner placed without authority a trap door in the sidewalk with hinges projecting up about an inch. He afterwards sold to defendant, who continued to use the trap door for access to the cellar. Plaintiff stumbled on the hinges and was hurt. Held, that the defendant could not be held to be continuing the nuisance, as she had no title to the highway and no right, strictly speaking, to remove the trap door constructed by another, and that, as the accident was not caused during or by her user of the trap door, she was not liable.

DISREPAIR OF HIGHWAY (e).

In those provinces where there is no statutory liability of a **British** municipality for non-repair of highway, there may be a liability **Columbia.** for *permitting the continuance of a dangerous nuisance* after notice express or implied; and the employment of a contractor will not relieve the corporation from its liability (f).

PROJECTION ABOVE SURFACE OF HIGHWAY (g).

Where it was the charter duty of a street railway company to **Nova** keep the roadway between and for two feet on each side of its **Scotia.** rails in repair and level with the rails, and an accident was caused by a rail standing above the level, it was held that the rail was a nuisance and the company liable (h).

DOCTRINE OF COMING TO NUISANCE (i).

The fact of persons having come to live within the scope of a **Ontario.**

(a) P. 399, *supra*.

(b) *Brown v. Town of Edmonton*, 23 S. C. R. 308. Cf. as to removal of projections into highway, *Caldwell v. Town of Galt*, 27 A. R. 162; *Williams v. Town of Cornwall*, 32 O. R. 255; *City of Halifax v. Reeves*, 23 S. C. R. 340.

(c) P. 400.

(d) 27 A. R. 296; cf. *Ewing v. City of Toronto*, 29 O. R. 197; *Ray v. Village of Petrolia*, 24 U. C. C. P. 73.

(e) P. 401, *supra*.

(f) *Steres v. Corporation of S. Vancouver*, 6 B. C. R. 17 (1897), case of undermined tree next roadway; cf. *Patterson v. City of Victoria*, 5 B. C. R. 628.

(g) P. 401, *supra*.

(h) *Joyce v. Halifax Street Ry. Co.*, 24 N. S. R. 113; 22 S. C. R. 258.

(i) P. 404, *supra*.

Ontario. nuisance after its creation does not prevent their complaining of it as a public nuisance (a).

PRESCRIPTIVE RIGHT TO COMMIT NUISANCE:
ACQUIESCENCE (b).

Ontario. It is a plain common law right to have the free use of the air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty (c) years will not bar that right (d). To bar the right within a stated period there must be such encouragement or other act by the party afterwards complaining as to make it a fraud in him to object (e).

Where the complainant has acquiesced in the nuisance for a length of time, he will not be granted an injunction (f) unless he can show that the nuisance has increased of late beyond what it formerly was (g).

PRESCRIPTIVE RIGHT TO COMMIT NUISANCE:
NAVIGABLE RIVER (h).

British Columbia. The right to continue an obstruction to navigable waters cannot be acquired by the Statute of Limitations (i). The Attorney-General for the Dominion has the right to take proceedings to restrain by injunction the pollution of tidal rivers (k).

STATUTORY AUTHORITY (l).

Ontario. See *Hiscock v. Lander* (m).

STATUTORY NUISANCE (n): GAS COMPANY (o).

Ontario. See *Watson v. City of Toronto Gas Light and Water Co.* (p).

(a) *Reg. v. Brewster*, 8 U. C. C. P. 208.

(b) P. 404, *supra*; cf. *Weir v. Claude*, 16 S. C. B. 575, and cases in Dig. Ont. Cas. Law, pp. 7339-7343.

(c) There is some authority for the statement that twenty years' user will legitimate an easement, but not a nuisance. See *Reg. v. Brewster*, 8 U. C. C. P. 208; see *Van Egmond v. Town of Seaforth*, 6 O. R. 599.

(d) *Radenhurst v. Coate*, 6 Gr. 139.

(e) *Ibid.*

(f) *Heenan v. Dewar*, 18 Gr. 438; 17 Gr. 638. Cf. *Caverhill v. Robillard*, 2 S. C. B. 575, acquiescence destroys right to abate; *City of Kingston v. Grand Trunk R. W. Co.*, 8 Gr. 535, work sanctioned by municipality creating a stag-

nant pool; *Township of Pembroke v. Canada Central R. W. Co.*, 3 O. R. 503. railway on highway; *Fenelon Falls v. Victoria R. W. Co.*, 29 Gr. 4, ditto.

(g) *Swan v. Adams*, 23 Gr. 220.

(h) P. 404, *supra*.

(i) *McEwen v. Anderson*, 1 B. C. R. 308 (1886).

(k) *Attorney-General v. Ewen*, 3 B. C. R. 468 (1895).

(l) Pp. 407, 409, *supra*.

(m) 24 Gr. 250, Commissioner of Public Works draining lunatic asylum so as to cause nuisance to plaintiff: injunction refused.

(n) P. 407, *supra*.

(o) P. 411, *supra*.

(p) 5 U. C. R. 262.

In *Francklyn v. People's Heat and Light Co.* (a) it was proved Nova Scotia. that the plaintiff's house was rendered uninhabitable by the vapour and gases from the defendants' works. It was contended that as the defendants were authorised by their charter to do all things necessary for the construction of their works and the manufacture of gas, they were not liable for any nuisance caused thereby, as a private owner might be, provided they used due care in the selection of the site for their works and operated them so as to cause as little nuisance and inconvenience to the neighbouring proprietors as was reasonably possible. The plaintiff was held entitled to an injunction, which was stayed upon undertaking that the defendants would remedy the annoyance and compensate for the injury sustained.

WHO MAY SUE (b).

The owner of the property is the person to complain (c). Ontario.

ATTORNEY-GENERAL (d).

The provincial Attorney-General is the proper person to file an information in respect of a nuisance caused by interference with a railway (e). Ontario.

REVERSIONERS (f).

See *Drew v. Baby* (g). Ontario.

WHO MAY BE SUED (h).

Both the landlord and the tenant may be liable (i). If the nuisance existed at the time of letting, both tenant and owner are liable; if it arises after the tenancy is created the tenant only is responsible (k). Ontario.

As to liability of agent, see *Reg. v. Brewster* (l); *Reg. v. Osler* (m).

A mortgagee is not liable for an injury caused by a mill dam, New Brunswick.

(a) 32 N. S. R. 44 (1899), effect of two years' delay in bringing action.

(b) P. 413, *supra*.

(c) *Hathaway v. Doig*, 6 A. R. 264, case where the plaintiff's wife was held the proper person and plaintiff had no *locus standi*.

(d) P. 413, *supra*.

(e) *Attorney-General v. Niagara Falls International Bridge Co.*, 20 Gr. 34; but see *Attorney-General v. Ewen*, 3 B. C. R. 468.

(f) P. 413, *supra*.

(g) 1 U. C. R. 438; 6 O. S. 239, release from tenants of cause of action against defendant exacted by Court before substantial damages allowed to landlord.

(h) Pp. 416—423, *supra*.

(i) *McCallum v. Hutchison*, 7 U. C. C. P. 508.

(k) *Reg. v. Osler*, 32 U. C. R. 324.

(l) 8 U. C. C. P. 208.

(m) 32 U. C. R. 324, agent merely to let or receive rents distinguished from general agent.

New Brunswick. although he lent the money for the very purpose of building the dam (a).

Nova Scotia. A purchaser continuing the nuisance of the former possessor cannot be held liable without notice (b).

PRIVY PITS (c).

Ontario. The owner of houses occupied by tenants can maintain an action in his own name for damages and to restrain the continuance of a nuisance arising from privy pits on the land of an adjoining owner if the nuisance is of such a nature as to be practically continuous and permanent. The owner of the adjoining land, although also occupied by tenants, is liable for the nuisance caused by them if the pits are so constructed that the constant use of them will necessarily result in the creation of a nuisance, or if allowed by the owner to remain in an unsanitary condition where there is power to remedy the grievance (d).

STATUTES RELATING TO NUISANCES.

Nuisances may often be directly remedied under the Criminal Code or by the enforcement of the by-law of a municipality or the regulation of a board of health. The following are some statutory provisions in this regard:—

The Criminal Code of Canada, R. S. C. 1906, c. 146. provides:

221. *Common Nuisance Defined.*—A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects.

"A private nuisance cannot be a criminal offence; and, as will be seen by section 193 (*now* 223), only such common or public nuisances as are stated to be so by section 192 (*now* 222) are criminal."

"The omission of an electric railway company operating their cars upon a public highway to use reasonable precautions so as to avoid endangering the lives of the public using the highway in common with the company is a breach of a legal duty, constituting a criminal nuisance (*R. v. Toronto Railway Company* (1900), 4 Can. C. C. 4)" (e).

222. *Common Nuisances which are Criminal.*—Everyone is guilty of an indictable offence, and liable to one year's imprisonment or a fine, who commits any common nuisance which

(a) *McNaughton v. Fraser*, 3 All. 247.

(b) *Corbitt v. Digby Water Co.*, 24 N. S. R. 25.

(c) P. 421, *supra*

(d) *Park v. White*, 23 O. R. 611.

(e) *Snow's Annotated Criminal Code*, p. 83.

endangers the lives, safety, or health of the public, or which occasions injury to the person of any individual.

223. *Common Nuisances which are not Criminal*.—Anyone convicted upon any indictment or information, for any common nuisance other than those mentioned in the last preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right (a).

R. S. O. 1897, c. 248 (The Public Health Act), ss. 63—80, 113, Ontario. 114, nuisances.

R. S. O. 1897, c. 250 (Slaughtering of Cattle, &c.).

3 Edw. VII. c. 19 (Consolidated Municipal Act), s. 586, by-laws that may be passed as to various nuisances; s. 747 (15), nuisances in police villages.

C. O. N. W. T. 1898, c. 70 (Municipal), s. 95 (23), abatement of nuisances. **Alberta and Saskatchewan.**

R. S. B. C. 1897, c. 91 (Health), ss. 55 *et seq.*, powers of local boards to abate nuisances. **British Columbia.**

R. S. B. C. 1897, c. 144 (Municipal Clauses), s. 60, power of municipal council to declare anything a nuisance and cause its removal.

R. S. M. 1902, c. 116 (Municipal), ss. 628—632, 650—653, by-laws for public health, safety and comfort; s. 666, fine for nuisance on highway. **Manitoba.**

R. S. M. 1902, c. 138 (Public Health), ss. 39 *et seq.*, nuisances; s. 88, abatement by order of Judge of King's Bench.

C. S. N. B. 1903, c. 53 (Public Health), s. 14 (c), removal of nuisances. **New Brunswick.**

C. S. N. B. 1903, c. 165 (Municipalities), s. 95 (36), by-laws as to public nuisances.

R. S. N. S. 1900, c. 70 (Municipal Corporation), ss. 134 (54) *et seq.*, nuisances. **Nova Scotia.**

R. S. N. S. 1900, c. 102 (Public Health), ss. 13, 54.

(a) See *R. v. Union Colliery Co.* (B. C. 1900), 3 Can. C. C. 523; affirmed 31 S. C. R. (1900), 81.

CHAPTER XV.

DUTIES ATTACHING TO THE USE OF PROPERTY.

NEGLIGENCE.

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ALL kinds of material property, whether land or chattels, are capable of being so used as to become instruments of mischief. But it is not in every case of user of property that any duty attaches to the party using it to prevent mischief arising. In the case of certain classes of property the owner may, subject to certain limitations, use it in the manner most beneficial to himself without regard to the injury which such user may inflict on his neighbours. Again in those cases in which there is a duty to prevent injury arising from the mode of user the extent of the duty is not always the same. In some it is an absolute duty to prevent damage ensuing, in others it is a limited duty to take care. Of injurious acts of user of property there are therefore three classes: those acts which may be done with absolute impunity; those acts lawful in themselves which the doer does at his peril, and liability for which is independent of any question of negligence; and thirdly, those acts which (in the absence of wilfulness) create liability only if done negligently.

1. The class of cases in which injurious acts of user of property may be done with impunity is very limited; it includes no cases of user of chattels, and is restricted to those modes of user of land which are generally described by the expression "natural." Acts which may be done with impunity.

"The cases have decided that where the maxim *sic utere tuo ut alienum non lædas* is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land. If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner he cannot succeed" (a). This term "natural use of land" as descriptive of the kind of user which will beget no responsibility is employed in a somewhat artificial and restricted sense. There are many modes of user of land which are natural, in the sense that they are customary in relation to the particular class of land to which they are applied, which if productive of damage to adjoining land cannot be justified. For instance, it is natural, in the ordinary sense of the term, to put manure upon land used for agricultural purposes, but if the manure soak through the soil and percolate away into the plaintiff's well, the defendant will be liable. Again, the erecting of a privy is a natural use of house property in the ordinary sense of the term, yet nevertheless the owner will erect it at his peril, and if the filth escape from it, he will be liable to his neighbour for any damage resulting from such escape. The expression "natural user" itself was first employed by Lord Cairns in *Fletcher v. Rylands* (b), and has since been adopted by various judges (c) as a convenient expression by which to designate those acts of user which may be done with impunity, but there has not as yet been given from the bench any definition of the expression, nor any exhaustive enumeration of the kinds of user which it would include.

(a) *Per* Brett, L.J., *West Cumberland Iron & Steel Co. v. Kenyon*, (1879) 11 Ch. D. p. 787.

(b) (1866-8) L. R. 3 H. L. p. 338.

(c) *Per* Fry, J., *Attorney-General v. Tomline*, (1879) 12 Ch. D. p. 230; *per*

Cotton, L.J., *Hurdman v. North Eastern R. Co.*, (1878) 3 C. P. D. p. 174; *per* Brett, L.J., *West Cumberland Iron & Steel Co. v. Kenyon*, *supra*; *per* Brett, M.R., *Whalley v. Lancashire & Yorkshire R. Co.*, (1884) 13 Q. B. D. p. 141.

Foremost, however, among the kinds of user included under it comes the working of minerals according to the recognised course of mining.

Damage by
mine water
flowing down
by natural
gravitation.

It is now well-settled law that "the owner of minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals" (a), and (subject to an exception in the case of subsidence arising from the withdrawal of support (b)) for any injury caused to the land of the adjoining owner by the removal of such minerals if the removal be conducted in the ordinary way the party injured will be without redress. Thus where the plaintiff and defendant were owners of two adjoining mines, and in the upper part of the defendant's mine, which was on the rise, there was collected a large subterranean body of water supported by a thick horizontal bar of coal, and the defendant worked this bar of coal, whereby the body of water flowed down and flooded the plaintiff's mine, the defendant was held to be free from liability, notwithstanding that at the time of working the coal he knew that the effect of his so doing would be to cause the damage which occurred (c). The proportion, which the benefit to be gained by the defendant bears to the injury to be inflicted on the plaintiff, is not a material element for consideration, and a mine owner proposing to remove certain minerals in his mine may do so with impunity none the less because the minerals when got will be but of trifling value, and the injury caused to his neighbour by their removal incalculable. The exemption from liability for damage resulting from the causing of water to flow down in the course of mining operations is not confined to the case of mere drainage percolating through the soil, but extends to the release of water already collected in a defined basin (d). But whether that exemption extends to the case of tapping a running stream seems doubtful. It has been held that a mine owner who in the course of mining taps a stream and thereby diminishes the flow of water in such stream is responsible therefor to a lower riparian owner (e), but the question whether he is also liable to

Damage
caused by
tapping
stream in
course of
mining.

(a) *Per* Lord Blackburn, *Wilson v. Waddell*, (1876) 2 App. Cas. p. 99.

(b) See below, p. 429.

(c) *Smith v. Kenrick*, (1849) 7 C. B.

515.

(d) *Smith v. Kenrick*, *supra*.

(e) *Grand Junction Canal Co. v.*

Shugar, (1871) L. R. 6 Ch. 483.

the adjoining owner whose mine or land he floods must be regarded as an open one, though there seems to be no reason in principle why he should be. The head-note to the case of *Crompton v. Lea* (a) suggests indeed that he would be liable, but a reference to the judgment will show that the decision in that case did not proceed upon any distinction between a running stream and a stationary pool. There the bill averred that the defendants threatened to work certain seams in a mine which it was impossible further to work for any mining purpose, and that the effect of working them would be to let in a river and flood the defendant's mine and through it the plaintiff's mine, and prayed an injunction. A demurrer to the bill was overruled by Hall, V.-C., apparently on the ground that the act which the defendants proposed to do was not for any legitimate mining purpose. Lord Blackburn in *Wilson v. Waddell* (b) refers to the point, but does not decide it.

But though a mine owner is not answerable for water flowing down by natural gravitation into his neighbour's mine, he must not, as a general rule, purposely interfere with the gravitation of the water so as to make it more injurious to the lower mine, or more advantageous to himself. Thus where the defendants, having in their mines two seams, A. and B., made a crut between them inclining downwards in the direction of seam B. as a means to the more convenient conveyance of the minerals in seam A. to the surface, and in order to enable them to work the minerals in the lower part of seam A., pumped water therefrom up to the level of the crut, which water flowed down the crut into seam B. and thence into the plaintiff's mine and did damage, it was held that the defendants were liable (c). In the same case it was also held that for water flowing down by natural gravitation from the upper part of seam A. into the crut, and so into the plaintiff's mine, the defendants were not liable. At the same time, however, the Court intimated that if the crut had been made for the purpose of turning water into the plaintiff's mine, which would not otherwise have arrived there, and not for the purpose of the conveyance of minerals from one seam to another, the action would have lain (d).

Interference
with natural
gravitation of
mine water.

(a) (1874) L. R. 19 Eq. 115.

C. B. N. S. 376.

(b) (1876) 2 App. Cas. p. 98.

(d) *Baird v. Williamson*, *supra*, at

(c) *Baird v. Williamson*, (1863) 15 p. 391.

And in *Westminster Brymbo Coal and Coke Co. v. Clayton* (a), where the barrier between the plaintiffs' and the defendant's mines having been perforated, the defendant constructed an artificial trough leading from his mines to the perforations, for the purpose of carrying off water raised by pumping from below and also the drainage from the upper *strata*, Wood, V.-C., granted an injunction to restrain the defendant from so using the trough, drawing no distinction between the two classes of water. But where the defendants worked two adjoining mines, A. and B., and the water from A. had been accustomed to flow through a certain artificial opening into B., and the defendants, to save the expense of pumping in B., stopped up the opening, thereby causing the water thus penned back to rise in A. so high as to flow through certain other openings made by the plaintiffs' predecessors into the plaintiffs' mine, it was held that the plaintiffs were not entitled to relief, on the ground that the stopping up of the opening between A. and B. had the same effect as though the opening had never been made (b). Another mode of interfering with the natural gravitation of mine water similar to that of making a trough to guide its course is that of boring a hole to get rid of the water, and the making of such bore-hole, though it may not amount to a trespass, will not be permitted if its effect will be to cause the water to enter the plaintiff's land to a greater extent than it did before (c).

Agricultural
operations.

The same immunity which attaches to the removal of minerals underground, attaches also to the digging and removing of portions of the soil on the surface (d), such as gravel, brick-clay, &c. It also, apparently, attaches to certain agricultural operations. "If a man be so situated with regard to his neighbour that by an ordinary act in the use of his neighbour's land, such as by deep ploughing, the ordinary flow of water is sent from that land on to his land, he would be in the position of having his land subject to that defect, and, therefore, could not recover for the injury he might suffer" (e). So where a farmer by ploughing up forest

(a) (1867) 36 L. J. Ch. 476.

(b) *Lomax v. Stott*, (1870) 39 L. J. Ch. 834.

(c) *West Cumberland Iron & Steel Co. v. Kenyon*, (1879) 11 Ch. D. 782; and cp. *Whalley v. Lancashire & York-*

shire R. Co., (1884) 13 Q. B. D. 131.

(d) See *per* Fry, J., *Attorney-General v. Tomline*, (1879) 12 Ch. D. p. 230.

(e) *Per* Brett, M.R., *Whalley v. Lancashire & Yorkshire R. Co.* at p. 141 *supra*. But these agricultural opera-

land and bringing it into cultivation caused thistles to grow where none grow before, and the thistle seeds were blown by the wind on to his neighbour's land and did damage, it was held that no action lay. He was under no obligation to cut the thistles periodically to prevent the escape of the seeds (*a*). This decision must be regarded as turning upon the fact that the operation which caused the thistles to spring up was a natural use of the soil. If it had been a non-natural use, then, although he did not intentionally bring the thistles on to his land, but they grew there spontaneously as the result of his having broken up the surface, he would have been liable on the principle of *Hurdman v. North Eastern R. Co.* (*b*).

There are, indeed, *dicta* to be found in some of the cases to the effect that the mine owner will be liable to his neighbour for injury caused by his working his mine *negligently* (*c*), but the expression "negligence" must not there be understood in its ordinary sense, for the mine owner, provided he uses his mine in a natural way, that is to say, according to the ordinary and approved course of working, is not under any obligation to take any care at all. Those *dicta* were probably intended to refer to improper modes of working, such as that of interfering with the gravitation of the mine water, in which case the user is not natural in the legal sense of the term.

But a covenant inserted in a mining lease that the lessee shall win the coal "fairly, duly, honestly, and in a proper and workmanlike manner" will render such lessee liable in damages should he win the coal by an unfair and negligent but profitable system of mining (*d*).

The rule that a natural user of land will create no responsibility does not apply to the case of withdrawal of support. Though the removal of minerals is a natural user of mineral property, if by reason of such removal a subsidence occurs in the land of

tions would not, upon the principle of the mining cases above referred to, include the making of ridges and furrows where the object was to get rid of the water.

(*a*) *Giles v. Walker*, (1890) 24 Q. B. D. 656.

(*b*) See next page. But liability for damages resulting from non-natural user is limited to cases in which there has

been nothing analogous to contributory negligence on the part of the plaintiff: *Eastern & South African Telegraph Co. v. Cape Town Tramways Co.*, (1902) A. C. 381, P. C.

(*c*) *Per Cur.*, *Smith v. Kenrick*, (1849) 7 C. B. p. 564; *per Erle, C.J.*, *Baird v. Williamson*, (1863) 15 C. B. N. S. p. 391.

(*d*) *Watson v. Charlesworth*, (1905) 1 K. B. 74, C. A.

the adjoining owner, the party causing the subsidence will be liable (a).

Mode of
assessing
damages.

In assessing the measure of damages in cases of subsidence the referee is not, however, entitled to include either an allowance for risk of future injury from probable further subsidence, or for present depreciation in value caused by the risk of future injury (b).

Act which
the doer does
at his peril.

2. To the second of the three classes of acts of user of property above mentioned, namely, that of acts lawful in themselves which the doer does at his peril, and liability for which is independent of any question of negligence, belong all those modes of user of land which are not included under the head of natural user.

Non-natural
user of land.

Non-natural user of land may consist in some physical dealing with the soil itself, such as a mining operation not conducted according to the ordinary course of mining, or the making of a channel whereby the rain-water, the flow of which was theretofore distributed over a wide surface, is concentrated on a particular point and discharged upon the plaintiff's land below in such volume as to do damage, or the making of an embankment whereby the natural drainage of the soil is penned back to the damage of the plaintiff's land above, or the erection of an artificial mound of earth against the wall of the plaintiff's house whereby damp is caused to ooze through the plaintiff's wall and do damage (c).

Bringing on
to land things
likely to do
damage if
they escape.

Again, non-natural user of land may consist in bringing on to it things not naturally there; if any such thing having been so brought there escapes therefrom and does damage the owner will be liable, however great care he may have taken to prevent the escape. Thus, where the defendant had a privy adjoining the plaintiff's house, and, owing to the wall of the privy being out of repair, the filth from the privy flowed into the plaintiff's cellar, the defendant was held liable, not upon the ground of any

(a) *Humphries v. Brogden*, (1850) 12 Q. B. 739; *Earl of Westmoreland v. New Sharlestone Colliery Co.*, (1900) 82 L. T. 725; H. L.; *Bishop Auckland Co-operative Society v. Butterknowle Colliery Co.*, (1904) 2 Ch. 419. See below, p. 443.

(b) *Tunncliffe & Hampson, Ltd. v.*

West Leigh Colliery Co., (1905) 74 L. J. Ch. 649.

(c) *Hurdman v. North Eastern R. Co.*, (1878) 3 C. P. D. 168; *Broder v. Saillard*, (1876) 2 Ch. D. 692. Cp. *Giles v. Walker*, (1890) 24 Q. B. D. 656; as to which see above, p. 429.

prescriptive liability in him to repair the wall for the benefit of the plaintiff, but on the ground that "he whose dirt it is must keep it that it may not trespass" (a). In *Fletcher v. Rylands* (b) the defendants constructed a reservoir on land situate over some old mines which had been worked out. The plaintiff, the owner of an adjacent colliery, had by lawful working of his own mine opened a communication between it and the old workings under the site of the reservoir. The existence, however, of this communication was not known to the defendants, nor were they guilty of any negligence whatever in the course of their operations. Upon the reservoir being filled the water burst down into the old workings below and flowed through the underground communication into the plaintiff's mine. The House of Lords held, affirming the judgment of the Exchequer Chamber, that the defendants were liable. Blackburn, J., in delivering the judgment of the Exchequer Chamber, laid down the law as follows: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major*, or the act of God. . . . The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbours', should be obliged to

Rule in
Fletcher v.
Rylands.

(a) *Tenant v. Goldwin*, (1704) 1 Salk. 378.

21 and 360; Lord Raym. 1089; *Brown* (b) (1866-8) L. R. 1 Ex. 265; L. R. 3
v. Dunstable Corporation, (1899) 2 Ch. H. L. 330.

make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench (a). And this statement of the law was expressly approved and adopted by the House of Lords (b). A recent exemplification of this rule is afforded by the rather unusual case of *O'Gorman v. O'Gorman* (c), in which it was held that the defendant, who kept, "in an unreasonable place," "an unreasonable number of bees of a dangerous and mischievous nature, and accustomed to sting mankind or domestic animals," was liable to the plaintiff in damages for personal injuries resulting from his horse, owing to the stinging of the bees, plunging and throwing him down.

In one case the Divisional Court drew a distinction between the escape of fair water and that of foul, and while admitting that a householder would be liable for the escape of foul water from his waste-pipe, held that in the absence of negligence on his part he was not liable for damage done to the adjoining premises by the escape of water from the supply pipe through which his house was supplied from the neighbouring waterworks (d). This decision, however, seems irreconcilable with the reasoning of the Court of Appeal in *Anderson v. Oppenheimer* (e), where it apparently was conceded that in such a case the defendant would come within the principle of *Fletcher v. Rylands*. Moreover, the distinction between dirty water and clean seems unsatisfactory, for the latter will in many cases be as injurious as the former (f). Nor will the fact that the person fouling the water acted under statutory powers exonerate him from liability (g).

(a) (1866) L. R. 1 Ex. p. 279.

(b) (1868) L. R. 3 H. L. p. 340.

(c) (1903) 2 Ir. R. 573.

(d) *Sutton v. Card*, (1886) W. N. p. 120; and see *Brown v. Dunstable Corporation*, (1899) 2 Ch. 378 (a case of sewage); and *Gibbins v. Hungerford*, (1904) 1 Ir. R. 211, C. A.

(e) (1880) 5 Q. B. D. 602. See below, p. 441.

(f) A pipe carrying the drainage from

two houses may be a sewer, although from one house it takes rain-water only: *Silles v. Fulham Borough Council*, (1903) 1 K. B. 829, C. A.

(g) *Batcheller v. Tunbridge Wells Gas Co.*, (1901) 84 L. T. 765. As to the responsibility *inter partes* when the damage complained of actually results from the act of a third party, see *Eg Brewery Co. v. Pontypriid Urban District Council*, (1904) 68 J. P. 3.

Thus, it has been held by the Privy Council in the recent case of *The Mayor and Corporation of Hawthorn v. Kannuluik* (a), that the appellant Mayor and Corporation were liable in damages (on the ground of negligence) for the flooding of the respondent's land with sewage, owing to the insufficient capacity of a sewer belonging to them.

In *National Telephone Co. v. Baker* (b), the principle of *Fletcher v. Rylands* was held to apply to the escape of an electric current from the land of the party creating it. In that case a tramway company, who had statutory authority to use electrical power and who in fact used the best known system of electrical traction, by the working of their tramway caused electrical disturbance of the wires of a telephone company in the neighbourhood. Kekewich, J., was of opinion that, but for the fact that they were acting under statutory powers they would have been liable (c).

Escape of
electric
current.

In *Firth v. Bowling Iron Co.* (d), the defendants' predecessors had fenced their land with wire rope, and the defendants continued the fence and occasionally repaired it. From long exposure the strands of the wire comprising the rope decayed, and pieces of it fell to the ground and lay hidden in the grass of the adjoining pasture occupied by the plaintiff. The plaintiff's cow grazing there swallowed one of these pieces and died in consequence. It was held that the defendants were liable to compensate the plaintiff for the loss of the cow on the ground that they were bound to prevent portions of their wire from escaping on to their neighbour's land. In *Crowthurst v. Amersham Burial Board* (e) the defendants planted on their land some yew trees, and allowed them to grow over the boundary so as to project over the adjoining field. The plaintiff, who was unaware of the existence of the yew trees, placed his horse at pasture in the field, and the horse ate some of the projecting branches of the yews and died in consequence. The defendants were held responsible, for, the trees being likely to do damage, they were bound to keep them in within the limits of their own land (f).

Growth of
yew trees.

(a) (1905) 22 T. L. R. 28, P. C.

(b) (1893) 2 Ch. 186.

(c) And see *Eastern Telegraph Co. v. Cape Town Tramways Co.*, (1902) A. C. 381.

(d) (1878) 3 C. P. D. 254.

(e) (1878) 4 Ex. D. 5.

(f) The mere possession, however, of yew trees which do not project over the boundary, however close to the boundary they may be, does not impose on the owner any duty to fence them so as to prevent his neighbour's cattle in the field adjoining from putting their heads

And an injunction will lie against a person who allows the branches of his trees to overhang his neighbour's land, if thereby his neighbour's trees suffer damage (a).

One who is bound by prescription or otherwise to allow foreign matter to come on to his land is to be considered as bringing it there within the meaning of the rule. Thus, where an old drain, which commenced under the defendant's premises and received his sewage, ran under and received the sewage of several other houses, then turned back through the defendant's premises, and ran under the plaintiff's cellar and thence away to a main sewer, and, the part of the return drain which passed through the defendant's premises being decayed, the sewage escaped and flowed into the plaintiff's cellar and did damage, it was held that the defendant was liable, notwithstanding that the drain was not known to the defendant to turn back and run under his premises and those of the plaintiff, and was not known to be out of repair, and the want of repair was not attributable to any negligence on his part (b). In that case the Court were of opinion that the fact of part of the sewage having come from the defendant's premises in the first instance was immaterial, and that, even if it had not, he would still have been liable, for "it was the defendant's duty to keep the sewage which he was himself bound to receive from passing from his own premises on to the plaintiff's premises otherwise than along the old accustomed channel" (c).

Contamina-
tion of oyster
beds.

It has been held in the recent case of *Foster v. Warblington Urban District Council* (d), that since the passing of the Sea Fisheries Act, 1868 (e), there can be no acquisition of a prescriptive right to discharge sewage into the sea, in any locality where such discharge will contaminate oysters in a private oyster bed.

over the boundary and browsing on them: *Ponting v. Noakes*, (1894) 2 Q. B. 281. Whether where the yews are adjacent to a high-road there is not such a duty as towards the owners of cattle passing along the high-road is doubtful. But possibly there is on the principle of *Barnes v. Ward*, (1850) 9 C. B. 392. See *per* Collins, J., in *Ponting v. Noakes*, (1894) 2 Q. B. p. 291.

(a) *Smith v. Giddy*, (1904) 2 K. B. 448.

(b) *Humphries v. Cousins*, (1877) 2 C. P. D. 239.

(c) *Ibid.* p. 244. In the metropolis the division of responsibility between the particular owner of property and the London County Council in the case of a sewer (that is, a drain used for the drainage of more than one building) is varied by a statute. See also *Nathan v. Rouse*, (1905) 1 K. B. 527.

(d) (1905) 3 L. G. R. 605.

(e) 31 & 32 Vict. c. 45.

The making of a fire involves the bringing on land of something not naturally there, and therefore the owner of the fire is bound to keep it in at his peril. "If my fire by misfortune burn the goods of another man, he shall have an action on the case against me" (a). "If my servant put a candle or other fire in a place in my house, and it falls and burns all my house and the house of my neighbour, an action on the case lies against me" (b). And the person who kindles a fire in an open field in the way of husbandry is as much liable for the escape of the fire as if he had made it in a house; "he must at his peril take care that it does not, through his neglect, injure his neighbour" (c).

Liability for damage by fire independent of negligence.

By the common law indeed not only was a person who kindled a fire absolutely liable to others whose property was injured by such fire spreading, but there was also a presumption of law that every fire originating upon a person's premises, the original kindling of which could not be traced, was kindled by the owner of the premises or his servants, for whose acts he was responsible. If the fire could be traced to the unauthorised act of a stranger (d), or even of a lodger (e), the owner of the premises was not liable, but in the absence of such proof of its origin it was presumed to be his fire (f). "If a fire light suddenly in my house I knowing nothing of it, and it burn my goods and also the house of my neighbour, an action on the case lies against me by him" (g).

Common law rule as to fire.

By 6 Ann. c. 31, s. 6, however, the law in this respect was altered, and it was provided that no action should be brought against any person in whose house or chamber any fire should accidentally begin. That Act has been repealed, but the provision of the above section is re-enacted, with this modification, that it is extended to fires other than domestic fires, in the Metropolitan Building Act, 14 Geo. III., c. 78, s. 86, which provides that no action shall be maintained against any person "in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . accidentally begin," and which section, although occurring in a local Act, has been decided

How far affected by statute.

(a) Rolle, Ab. Action sur Case, B. 1.

(b) *Ibid.* B. 3.

(c) *Tuberville v. Stamp*, (1697) 12 Mod. 152.

(d) Rolle, Ab. Action sur Case, B. 6.

(e) *Allen v. Stephenson*, (1700) 1 Lutw. 90.

(f) See *per* Lord Tenterden, C.J. *Becquet v. Macarthy*, (1831) 2 B. & Ad. p. 958.

(g) Rolle, Ab. Action sur Case, B. 2.

to be a general law applicable to the whole kingdom (*a*), although in a modern case (*b*) its application to Scotland has been doubted. The effect of these statutes, it is apprehended, was merely to shift the *onus* of proof, by doing away with the presumption that the fire was kindled by the owner of the premises, and to leave the rule as to the extent of the liability of the party who is proved to have kindled it exactly as it was by the common law. The words "accidentally begin" refer to the original kindling of the fire, not to its spreading. Thus where a man lit a fire in his field and the wind caused it to spread and burn the plaintiff's trees in the adjoining field, the case was held not to be within the Act (*c*), one of the reasons being that the fire "did not begin accidentally, but was knowingly lighted by the defendant himself" (*d*). So, too, if a person, without express statutory authority, use locomotive steam engines on his land and sparks escape from the engines and do damage, he will be liable although he may have taken all possible precautions to prevent the escape of the sparks (*e*); and no distinction can properly be drawn between the case of a fire in a steam-engine and any other kind of fire, for the language of the Act is perfectly general. If then a person light a candle in his house, and while carrying it accidentally stumble and set fire to the curtains, and the fire spread to the house of his neighbour, apparently he will have no defence, the statute notwithstanding, though perhaps in such case one might properly differentiate between the original intentional lighting of the candle and the subsequent accidental ignition of an altogether different article by reason of the fortuitous stumble of the person carrying the candlestick. It may seem remarkable that if the above statement of law be accurate no action for damage caused by fire accidentally spreading from one house to another should ever have been brought since the passing of the above statute of Anne. But it is a sufficient answer to any objection founded upon that fact to point out that neither is

(*a*) *Filliter v. Phippard*, (1847) 11 Q. B. 347; note especially pp. 354, 355.

(*b*) *Westminster Fire Office v. Glasgow Provident Investment Society*, (1888) 13 A. C. 699, Lord Watson at p. 716.

(*c*) *Filliter v. Phippard*, (1847) 11 Q. B. 347.

(*d*) *Per cur.*, *Filliter v. Phippard*, p. 358; and see *Vaughan v. Meniere*, (1837) 3 Bing. N. C. 468.

(*e*) *Jones v. Festiniog R. Co.*, (1868) L. R. 3 Q. B. 733; *Pocell v. Fall*, (1880) 5 Q. B. D. 597.

any trace to be found in the books since that date of any action for *negligently* causing fire to spread from one house to another, although cases must arise every day in which it could be clearly proved that the spread of the fire was due to the grossest carelessness, and there is express authority that the statute does not protect any one who has been guilty of negligence (a).

A person however will only be held responsible for damage by fire, if it be proved that the fire is *his* fire, if, that is to say, he caused the original ignition; but this he will have done none the less because such ignition was unintentional, if he brought into contact substances which spontaneously ignited under conditions making such spontaneous combustion antecedently probable. Thus where a person made a stack of hay on the edge of his land in such a green condition that it was likely to ignite, and did ignite, and the fire burnt the plaintiff's cottages adjoining, the owner of the stack was held liable (b). This case is sometimes said to have proceeded on the ground of negligence, but the negligence charged against the defendant was not in omitting to take precautions to prevent the fire spreading, but in stacking the hay while green, without which the fire could not have been said to be the defendant's fire at all. In the course of his judgment Tindal, C.J., puts the case of a chemist making experiments with ingredients, singly innocent, but, when combined, liable to ignite; if he leaves them together and injury is thereby occasioned to the property of his neighbour, it cannot be doubted that he would be liable (c). The fire resulting from such combination, although unintentional, is the defendant's fire within the meaning of the rule.

The fire must be defendant's fire.

Spontaneous ignition.

So, too, one who brings gas on to his premises, or stores gunpowder or other explosives there, is presumably liable if an explosion occurs which does damage, without any proof of negligence. The storage of explosives is now regulated by the Explosives Act, 1875 (d), under which the maximum amount of gunpowder which may be kept in any one place for private use is thirty pounds, while gunpowder kept in larger quantities, or

Damage by gas, explosives, or electricity.

(a) *Filliter v. Phippard*, (1847) 11 Q. B. 347.

(b) *Vaughan v. Menlove*, (1837) 3 Bing. N. C. 468.

(c) *Vaughan v. Menlove*, (1837) 3 Bing. N. C. at p. 474.

(d) 38 Vict. c. 17.

for purposes of sale, can only be lawfully stored in specially licensed or registered premises. Even should an explosion occur in premises duly licensed under the Act, the owner would still be liable for damage accruing to his neighbours therefrom, for there is nothing in the statute to take away private rights of action for injuries arising from the keeping of explosives; while if explosives be stored in breach of the regulations of the Act, and an explosion should occur as the result of their being struck by lightning, it may well be doubted whether the act of God (*a*) would in such case afford any defence, the mere keeping of the explosives being, under the circumstances, *per se* unlawful.

In the case of an explosion in an electric main, caused by insufficient ventilation, it was held recently that the local authority to whom it belonged was liable in damages to a passer by for injuries sustained by her from nervous shock (*b*).

Defendant
liable only
where thing
complained of
escaped of
itself.

The rule of law as laid down in *Fletcher v. Rylands* (*c*) includes all kinds of things likely to do mischief if they escape, but in order to bring a case within that rule the thing whose escape is complained of must have escaped of itself, that is to say, either voluntarily and of its own motion, as in the case of a beast trespassing, or else by the mere operation of one of the ordinary forces of nature, such as gravity in the case of water flowing from a reservoir or filth from a privy, combustion in the case of gunpowder exploding or fire spreading, and diffusion in the case of gases escaping from chemical works. The rule does not apply to a case in which the thing complained of has been actually removed from off the defendant's land by a third person. Thus a declaration averring that the defendant was possessed of yew trees, and that it was his duty to prevent the clippings from being placed on land not occupied by him, and that he took so little care of the clippings that they were placed on land not occupied by him, whereby the plaintiff's horses were poisoned, was held bad on demurrer on the ground that it was consistent with the declaration that the clippings might have been carried on to the plaintiff's land by a stranger without the defendant's knowledge (*d*). A distinction, however, is here apparently to be

(*a*) As to which, see below, p. 453.

(*b*) *Solomons v. Stepney Borough Council*, (1905) 3 L. G. R. 912.

(*c*) (1866) L. R. 1 Ex. p. 279.

(*d*) *Wilson v. Newberry*, (1871) L. R. 7 Q. B. 31.

drawn between such a case as this last in which the act of the third party was the sole motive power which changed the local position of the thing which did the damage, the thing having no tendency to escape of itself, and a case in which, the thing having a tendency to escape of itself, the act of the third person has consisted in removing the barrier or bond that confined it, as for instance, where a stranger has wrongfully damaged the embankment of the defendant's reservoir, whereby the water has flowed out, or has opened the gate of the defendant's field, whereby his cattle have escaped. In the latter, it is conceived, the defendant will be responsible for the escape, notwithstanding the intervening wrongful act of the third person. This distinction is no doubt somewhat fine, but it seems warranted by the authorities (a).

But as the law of gravitation applies as well to solid bodies as to fluids, it is apprehended that a solid body placed at a distance from the ground in a position in which from want of cohesion it may fall is a thing having a tendency to escape within the meaning of the rule, and that if it falls from such position of its own weight and does damage, the owner who placed it there will be responsible (b). Thus where the defendant was possessed of a lamp which projected several feet from his house over the public foot pavement, and the lamp, owing to decay of part of the iron-work, but without, as the jury found, any negligence on the part of the defendant, fell and injured a passer-by, the defendant was held liable on the ground that the duty of a person who maintains for his own purposes something projecting over a highway is a

Rule of
Fletcher v.
Rylands
applies to
escape of
solid bodies
as well as of
fluids.

(a) See below, p. 455.

(b) The ground upon which Blackburn, J., in *Fletcher v. Rylands*, (1866) L. R. 1 Ex. p. 286, distinguished the case of *Scott v. London Dock Co.*, (1865) 3 H. & C. 596, where a bale of cotton which the defendants' servants were lowering fell upon the plaintiff, namely, that the plaintiff by being on the defendants' premises took the risk of inevitable accident on himself, shows that in his opinion no distinction in this respect was to be drawn between solid bodies and fluids. It follows that had the bale fallen on the plaintiff

while standing on his own land adjoining that of the defendants, Blackburn, J., would have held them liable without proof of negligence. And see *Marney v. Scott*, (1899) 1 Q. B. 986. But whether in so extending the principle of *Fletcher v. Rylands* to the fall of chattels which are in course of being handled he would not have been going too far may well be doubted. It is presumed that the principle must be regarded as confined to the escape of injurious things which have been left by the defendant in a condition of rest.

duty to keep it in such a state as not to damage the public (a), and the language of the majority of the Court suggested that that duty extends even to latent defects (b). So if a brick or stone falls out of the wall of a building, or a tile or chimney-pot from the roof, the owner of the premises will probably be responsible for any damage that may be caused thereby, irrespective of any question of negligence. It will be no defence that he employed a competent and experienced contractor to put the premises into a proper state of repair (c), and yet so far as care is concerned he clearly could do no more; the reason being that he who maintains bricks, tiles, or other bodies in a position from which they may fall by their own weight maintains them there at his peril (d). In the case of *Kearney v. London, Brighton, &c., R. Co.* (e), where a brick fell out of the pier of a railway bridge upon a person walking in the high-road below, and where, the judge having left the case to the jury on the issue of negligence, the question afterwards argued before the Exchequer Chamber was, whether there was evidence of negligence to go to the jury, it seems indeed to have been assumed that the common law obligation of the owner of premises in such a case is limited to the exercise of care, but that assumption is irreconcilable with *Tarry v. Ashton*. No doubt in *Kearney v. London, Brighton, &c., R. Co.*, it was essential to prove negligence, for the defendants in erecting and maintaining their pier acted under statutory powers, and so brought themselves within the principle of *Vaughan v. Taff Vale R. Co.* (f), but that was not the ground upon which the case was argued. Possibly the Court may have paid more attention to the fact that proof of negligence was necessary than to the grounds upon which such necessity rested (g). In *Morgan v. Hart* (h), where an action was brought for injuries sustained from the falling of a signboard which was attached to the outside of the defendant's shop, the

(a) *Tarry v. Ashton*, (1876) 1 Q. B. D. 314.

(b) Blackburn, J., though doubting on this point, declined to decide the contrary. Having regard to his judgment in *Fletcher v. Rylands* (see note, p. 439), it is somewhat remarkable that Blackburn, J., should have been the one member of the Court to entertain any

doubt upon this point.

(c) *Tarry v. Ashton*, *supra*.

(d) See too *Firth v. Bowling Iron Co.*, (1878) 3 C. P. D. 254.

(e) (1871) L. R. 6 Q. B. 759.

(f) (1860) 5 H. & N. 679. See above, p. 408.

(g) (1871) L. R. 6 Q. B. p. 761.

(h) *Times*, Nov. 27, 1888.

judge at the trial, there being no evidence of negligence, entered judgment for the defendant, and on appeal this judgment was affirmed by the Court of Appeal. There was evidence that the day on which the accident happened was exceptionally windy and stormy, but whether the Court went upon the ground that the accident was due to the act of God, or that the falling of solid bodies did not come within the principle of *Fletcher v. Rylands*, did not appear. The question whether that principle does or does not extend to the escape of solid bodies cannot be regarded as definitely settled, though to hold that it does not would necessarily involve a surrender of logical consistency.

A person, however, will not in all cases bring himself within the principle of *Fletcher v. Rylands* if he has brought the foreign matter on to the place from whence it escaped, not for his own purposes only, but for the common purposes of himself and the plaintiff. In *Anderson v. Oppenheimer* (a) the plaintiffs were tenants of the ground floor and basement of a house of which the defendant was owner, the upper floors being let out to separate tenants. The different floors were supplied with water from a cistern at the top of the house. The branch service pipe supplying the first floor burst, and the basement was flooded. The case was held not to be within the rule of *Fletcher v. Rylands* on the ground that the water service as a whole was for the common benefit of the plaintiffs and the other tenants; but it was suggested by Thesiger, L.J., that "if the apparatus for storing and distributing the water had been entirely unconnected with the plaintiff's premises, the matter might have worn a different aspect." This *dictum*, however, must be read as intended to be limited to cases in which the water-service apparatus has been introduced into the house after the commencement of the plaintiff's tenancy, for if the water were laid on to the upper floor before the plaintiff entered into occupation of the lower, he could not complain. "One who takes a floor in a house must be held to take the premises as they are" (b). And this was the view taken by the Queen's Bench in *Ross v. Fedden* (c). There the plaintiff occupied the ground floor and

Application
of the rule as
between
occupiers of
different
floors in same
house.

(a) (1880) 5 Q. B. D. 602.

Taylor, (1871) L. R. 6 Ex. p. 222.

(b) *Per Martin, B., Carstairs v.*

(c) (1872) L. R. 7 Q. B. 661.

the defendants the second floor of the same house. In the defendants' premises was a water closet, to which they had access, and which closet was assumed, there being no evidence to the contrary, to have been put up by the landlord before the plaintiff came into occupation. The waste pipe of the closet, without any negligence on the part of defendants, got stopped up with paper, which caused the water in the pan to overflow and so to flood the plaintiff's premises. It was held that the defendants were not liable for the damage, upon the ground that the person who takes a floor of a house takes it "subject to the ordinary risks arising from the use of the rest of the house as it stands; and that one who merely continues to use the rest of the house as it stands, and in the ordinary manner, does not fall within the rule laid down in *Fletcher v. Rylands*, and, in the absence of negligence, is not liable for the consequences" (a). From the above-cited *dictum* of Thesiger, L.J., it appears that, except as above, the principle of *Fletcher v. Rylands* applies as well between the occupants of different floors of a house as between adjacent owners of land, a point which was left in doubt in the earlier case of *Carstairs v. Taylor* (b). Thus in *Abelson v. Brockman* (c) where an overflow of water, from the upper on to the lower stories of a house, was occasioned by the introduction of foreign matter into the waste pipe of a sink, the defendant was held liable, although the Court (Pollock, B.) expressly distinguished the case from *Fletcher v. Rylands*.

Liability of
owner of
tenement
house.

Again, where a house is let in separate flats and the possession of the structure as a whole remains in the landlords, the tenants of the separate floors are entitled to require from the owner of the property the due exercise of all reasonable precautions to prevent the accrual of damage.

Thus where a rain water gutter on the roof of a building, let out in tenements, was under the control of the landlords and they neglected, after notice given, to clean it out, with the result

(a) *Ross v. Fedden*, (1872) L. R. 7 Q. B. 661 at p. 663. The Judges of the Q. B. adopted the reasoning of the County Court Judge, before whom the case was tried. And a similar decision was arrived at, though on different

grounds, in the subsequent case of *Sterens v. Woodward*, (1881) 6 Q. B. D. 318.

(b) (1871) L. R. 6 Ex. 217.

(c) (1890) 54 J. P. 119.

that the occupants of one of the flats suffered damage by reason of an overflow of rain water, it was held by the Court that the landlords were guilty of negligence and consequently responsible for the damage resulting from their want of care (a).

If the owner of land, in the course of mining operations or otherwise, excavates his soil and thereby withdraws the support to which the land of his neighbour is entitled, though such act of excavation is lawful in itself (b) he nevertheless does it at his peril; and if in consequence of the withdrawal of the support a subsidence in his neighbour's land occurs, he will be liable, however great care he may have taken to prevent such an occurrence by substituting props or shores for the support which he has taken away (c). "If the plaintiff was entitled to the support of the defendant's land and was deprived of it, the absence of negligence is immaterial" (d). In *Haines v. Roberts* (e), where the plaintiff's buildings were damaged by the defendant's mining operations, and the jury negatived negligence, it was held that such finding did not affect the plaintiff's right to recover (f). And it is apprehended that this rule, that a person who withdraws the support to which another is entitled does so at his peril, is not confined to cases in which the plaintiff's land is in its natural condition unburdened with the weight of houses, but equally applies where a right to an additional amount of support has been acquired by prescription (g).

Withdrawal
of support.

Every person who maintains an ordinary domestic coal plate or cellar flap in the pavement of a highway does so apparently at his peril (h). For the plate or flap is nothing more than a horizontal fence of a dangerous excavation in the road. And a

Coal plates
and cellar
flaps.

(a) *Hargroves, Aronson & Co. v. Hartopp and Another*, (1905) 1 K. B. 472.

(b) *Backhouse v. Bonomi*, (1858-61) 9 H. L. C. 503.

(c) *Humphries v. Brogden*, (1850) 12 Q. B. 739; and see *Tunnicliffe & Hampson, Ltd. v. West Leigh Colliery Co.*, (1905) 74 L. J. Ch. 649; and *Barr v. Baird & Co.*, (1904) 6 F., Ct. of Sess. 524.

(d) *Per Martin, B., Brown v. Robins*, (1859) 4 H. & N. p. 193.

(e) (1857) 7 E. & B. 625.

(f) See, too, *Stroyan v. Knowles*, (1861) 6 H. & N. 454.

(g) In the cases above cited this point was not raised, for in none of them was there any suggestion that the weight of the buildings had contributed to cause the subsidence. But see *per Little Dale, J., Dodd v. Holme*, (1834) 1 A. & E. p. 503.

(h) Nor does it amount to contributory negligence for a member of the public to stand on a grating, *Gwinnell v. Eamer*, (1875) L. R. 10 C. P. 658.

duty to fence, where it exists, has been held to be an absolute duty (a). Consequently if a third person wrongfully tampers with the plate or flap whereby a passer-by falls into the hole and is injured the occupier of the premises will be liable. This duty to fence extends to private ground that is both open and adjacent to a public highway. Though what constitutes sufficient proximity to support an action is a matter to be deduced from the facts arising in each particular case (b).

Liability for
damage done
by animals.

Animals *feræ
naturæ*.

Another class of acts lawful in themselves which a person does at his peril, and his liability for which is independent of any question of negligence, is that of keeping animals of a kind likely to do damage if they escape. A man who keeps an animal is liable for all the damage which he knows that it is likely to commit; or which he ought to know as matter of common knowledge that it is likely to commit, by reason of the fact that it is according to the common experience of mankind, part of the ordinary nature of such animal to commit damage of that kind if suffered to be at large (c). Every man must be taken to know that animals *feræ naturæ*, such as monkeys, are prone to bite, though not shown to be vicious beyond the average of their species—that a savage beast such as a tiger if it escapes will act after its kind. “Though (the owner) have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage” (d). An elephant is an animal *feræ naturæ* for this purpose (e).

Animals
known to
have con-
tagious
disease.

Animals suffering from a contagious disease are likely if they escape, to infect other animals with which they may come into contact, and their owner, therefore, if he knows that they are so diseased is bound to keep them in at all hazards. Where the defendant's sheep, being diseased with scab, by some unexplained means got into the plaintiff's field and infected the plaintiff's sheep, in the absence of evidence of knowledge that the sheep

(a) *Lawrence v. Jenkins*, (1873) L. R. 2 Ir. R. 573.
8 Q. B. 274. See below, p. 455.

(b) *Derlin v. Jeffray's Trustees*,
(1903) 5 F. 130, Ct. of Sess.

(c) *O'Gorman v. O'Gorman*, (1903)

(d) Hale, P. C., Vol. 1, p. 430. And
see *May v. Burdett*, (1846) 9 Q. B. 101.

(e) *Filburn v. People's Palace &
Aquarium Co.*, (1890) 25 Q. B. D. 258.

were scabby the defendant was held not liable, but it was not disputed that had he known it he would have kept them at his peril (a). The keeping of animals suffering from contagious diseases is now to some extent regulated by Act of Parliament (b).

It is part of the ordinary nature of horses to kick, or bite, *one another* in quarrel or sport, at all events when they are loose in a field, and especially is it natural for stallions to bite or kick mares, and therefore in an action brought for an injury caused by one horse to another under such circumstances it is unnecessary to show that the defendant knew of any peculiar vicious disposition on the part of his horse (c). But it is not so much in the ordinary nature of horses to kick *human beings*, as it is to kick their own species, and therefore where a horse on a highway kicked a child it was held that in the absence of proof of knowledge of a special vicious disposition the owner was not liable (d). Although probably the infrequency of kicking in the one case and the frequency in the other is less a matter of propensity than of opportunity, especially as kicking, at least with the hind legs, is a much less usual method of attack than is biting, when stallions fight with each other. It is probably to be regarded as part of the ordinary nature of bulls to attack horses, and consequently "it might be argued that the owner of a bull who allowed it to escape would be liable if it attacked a horse" without notice of any peculiar vice in the bull (e). The point, however, has never been expressly decided in this country. In America it has been held that the owner of the bull under such circumstances is liable (f).

Animals
domitæ
naturæ
following
their natural
propensities.

Again, it is part of the ordinary nature of all animals, however tame, to wander wherever their instinct leads them, and so commit trespasses, as where cattle or horses break into a

Trespasses by
cattle, &c.

(a) *Cooke v. Waring*, (1863) 2 H. & C. 332.

(b) 57 & 58 Vict. c. 57. For Statutory regulations respecting carriage of animals, see 41 & 42 Vict. c. 74, s. 33.

(c) *Lee v. Riley*, (1865) 18 C. B. N. S. 722; *Ellis v. Loftus Iron Co.*, (1874) L. R. 10 C. P. 10.

(d) *Cox v. Burbidge*, (1863) 13 C. B. N. S. 430. This appears to be the true ground upon which this case is to be

distinguished from the two last. It was upon this ground that the County Court Judge in *Lee v. Riley* distinguished it, and it does not appear that on appeal the Court of Common Pleas in any way disapproved his reasoning.

(e) *Per* Blackburn, J., *Smith v. Cook*, (1875) 1 Q. B. D. p. 83.

(f) *Dolph v. Ferris*, (1844) 7 Watts & Serg. (Penns.) 361.

cornfield and eat or trample down the corn. "If a man's cattle, sheep, or poultry, stray into his neighbour's land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbour for the consequences" (a). So the owner of a dovecote is liable if his pigeons eat his neighbour's corn. The keeping of a dovecote is not indeed a public nuisance, but any private injury resulting from it is actionable, and "if the pigeons fly abroad to the damage of the King's subjects, the Judges of Assize may take cognizance of it" (b).

Exception to liability for trespassing cattle where they stray off highway.

But although it is in the nature of all animals to trespass, there is an exception to the owner's *prima facie* liability in cases in which the trespass is committed from off a highway by an animal which, being lawfully on the highway at the time, escapes therefrom on to the adjoining land, the law in this matter discriminating between animals accidentally straying from a drover's control and cattle wandering unattended on the highway (c). In the former case to establish liability in the owner it is necessary to prove negligence on the part of the person in charge of the animal at the time of the accident. Therefore where an ox belonging to the defendant, whilst being driven by his servants through the streets of a town entered the plaintiff's shop, which adjoined the street, and damaged his goods, there being no proof of negligence on the part of the persons in charge of the ox, the defendant was held not liable (d). This exception rests apparently on the broad ground that, traffic on highways being necessary to the public welfare, it is for the public convenience that those whose property is adjacent to highways should bear the loss of any injury necessarily resulting from such traffic. Blackburn, J., in *Fletcher v. Rylands* (e) suggests that the reason of the exception is that he who has his property in the neighbourhood of a highway takes upon himself the risk of injury from the danger incident to the traffic. This suggestion, however, can hardly be

(a) *Per Williams, J., Cox v. Burbridge*, (1863) 13 C. B. N. S. p. 438.

(b) *Dewell v. Sanders*, (1618) Cro. Jac. 490; and see *per Bayley, J., Hannam v. Mockett*, (1824) 2 B. & C. p. 940.

(c) *Luscombe v. Great Western Ry* (1899) 2 Q. B. 313.

(d) *Tillett v. Ward*, (1882) 10 Q. B. D. 17.

(e) (1866) L. R. 1 Ex. p. 286.

regarded as satisfactory, for the owner of fixed property has no power to change its local position, and therefore his having his property where it is is not a voluntary act. The owner of animals, however, which stray off a highway on to the adjoining land is bound to drive them off again with all reasonable speed; if he leave them on the land where they are trespassing longer than is reasonably sufficient for the purpose, the owner of the land may distrain them *damage feasant* (a). It was decided in the case of *Powell v. Fall* (b) that the owner of a locomotive traction engine was liable independently of negligence for injury to a haystack, caused by sparks escaping from the engine, although at the time of the escape it was passing along a high road. The extent of the obligation in respect of fire and beasts being precisely the same where the escape is from the owner's land, it is difficult to see why the exemption in the case of beasts where the escape is from a highway should not equally exist in the case of fire, at all events where the fire is of such a kind as is not unusually met with on high roads; and as it is usual and necessary in the interests of agriculture, that traction engines should travel about the country, the danger arising from sparks escaping from such engines ought to be regarded as one of the risks ordinarily incident to the traffic. But this point was not taken, and the case turned entirely upon the question as to whether any special protection was afforded by the Locomotive Acts.

Whether there is not a natural propensity in all dogs to chase and destroy game is doubtful, but probably there is (c). The propensity of dogs to worry sheep or cattle would seem upon the border line, and accordingly the Courts formerly held (d) special proof of a *scienter* to be necessary to fix the owner with liability. But it is now provided by 28 & 29 Vict. c. 60, s. 1, that "The owner of every dog shall be liable in damages for injury done to cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to show a mischievous propensity in

Natural
propensities
of dogs.

(a) *Goodwyn v. Chereley*, (1859) 4 H. & N. 631.

(b) (1880) 5 Q. B. D. 597.

(c) In *Read v. Edwards*, (1864) 17 C. B. N. S. 245, where the owner of a dog which killed some young pheasants

was held liable, he was proved to have had notice of a special tendency in the dog to kill game.

(d) See *Orr v. Fleeming*, (1855) 2 Macq. 14.

Shooting
trespassing
dogs.

Damage by
rabbits and
game.

for a trespass causing substantial damage the owner would be liable. In the case of a landowner or his servant shooting a trespassing dog it is, however, necessary in order to avoid liability under the Malicious Damage Act, 1861 (a), to show that the act complained of was done in a *bonâ fide* belief that it was essential for the protection of property (b). To revert to trespass by animals, in the case of *Farrer v. Nelson* (c), Pollock, B., dealing with a question of damage by rabbits, expressed himself in terms with which it would be difficult to reconcile the case of *Boulton v. Hardy* (d). "I will first deal," he said, "with the question whether an action can be brought by a neighbour against any person who collects animals upon his land so as to injure the crops of the neighbour, and I should say that beyond doubt such an action would lie, and that the rule upon which it would be founded would be not so much negligence as upon an infraction of the rule '*sic utere tuo ut alienum non lædas*.'" The question, therefore, in the case of game also may still be considered to be open; and it is certainly difficult to see why the Courts should hold damage caused by dogs or game to form any exception to the general rule. With regard to game, however, it is to be observed that in order to bring the defendant within the general principle laid down in *Fletcher v. Rylands*, it must be shown that the game complained of is *his* game. It will not be enough for this purpose that it has come from the defendant's land; he must have actively interfered to bring about its existence there, as by bringing it upon his land from elsewhere, or perhaps by artificially increasing the quantity naturally present by destroying the vermin that would in the ordinary course of things prey upon it. Mere neglect to kill the game down would probably impose no liability, for it could not in such case be regarded as *his* game.

Animals
known to
have a
peculiarly
vicious
tendency.

In cases of animals doing damage of a kind which it is no part of their ordinary nature to do it is essential, in order to render the person keeping them liable therefor, to show that he had knowledge of a peculiar vicious tendency in the animal to do

(a) 24 & 25 Vict. c. 97, s. 41.

Mitchell, (1903) 88 L. T. 870.

(b) *Miles v. Hutchings* (1903), 2 K. B. 714; and see *Armstrong v.*

(c) (1885) 15 Q. B. D. p. 260.

(d) (1597) Cro. Eliz. 547.

damage of that particular kind. It not being usual for dogs (*a*), or horses (*b*), or rams (*c*), or bulls (*d*) to attack human beings, the plaintiff complaining of such injury from such animals must establish that the defendant knew they were exceptionally savage and prone to injure mankind (*e*). It is not necessary, in order to sustain an action for a bite given by a savage dog, to show that the dog has actually bitten another person before it bit the plaintiff, it is enough to show that it has to the knowledge of the defendant evinced a savage disposition by attempting to bite (*f*). Nor, it is presumed, is the peculiar vicious tendency in a dog, knowledge of which will render the owner liable, confined to a tendency to bite. It probably extends to any known vicious habit likely to cause damage, such as the not uncommon habit of rushing out of a gate and barking at passing horses, whereby the horses become frightened and bolt. In one case of *nisi prius* where the plaintiff was driving a mare past the defendant's house when the defendant's dogs rushed out barking and snapping at the mare's heels, which caused her to plunge and kick whereby she eventually fell down and injured herself, Bramwell, B., directed the jury that if the dogs were mischievous and the defendant knew it he was liable (*g*). The jury found for the plaintiff, and no attempt seems to have been made to disturb the verdict. But in such cases it would always be a question of degree whether the fear inspired in the horse was under the circumstances natural, or whether it was due to exceptional timidity on its part. Where the owner of a dog appoints a servant to keep it, it is not necessary that the owner should have personal knowledge of the dog's ferocity, the knowledge of such servant is enough (*h*). But knowledge of a servant not appointed to keep it will not *per se* suffice to charge the

Where
scienter of
owner's
servant
sufficient.

(*a*) *Mason v. Keeling*, (1699) 12 Mod. C. P. 1.
332.

(*b*) *Cox v. Burbidge*, (1863) 13 C. B. N. S. 430.

(*c*) *Jackson v. Smithson*, (1846) 15 M. & W. 563.

(*d*) *Hudson v. Roberts*, (1851) 6 Ex. 697.

(*e*) See *Osborn v. Chocqueel*, (1896) 2 Q. B. 109.

(*f*) *Worth v. Gilling*, (1866) L. R. 2

(*g*) *Read v. King*, Times, Jan. 27, 1858. *Quære* whether since the statute 28 & 29 Vict. c. 60 (as to which, see above, p. 447), the owner would not be liable in such a case without any special knowledge of a mischievous propensity in the dog.

(*h*) *Baldwin v. Casella*, (1872) L. R. 7 Ex. 325.

it does not carry with it or import any probability of a recurrence, when in other words it does not imply any law from which its recurrence can be inferred, does not place that phenomenon out of the operation of the rule of law with regard to the act of God. In order that the phenomenon should fall within the rule it is not necessary that it should be unique, that it should happen for the first time. It is enough that it is extraordinary, and such as could not be reasonably anticipated " (a).

It has been doubted whether the exception of the act of God applies to the case of keeping a wild beast, whether for example, a man who kept a tiger would not be liable if lightning broke its chain and it got loose and did mischief (b); but it is to be observed that there is nothing wrong *per se* in keeping a wild beast. " A man has a right to keep an animal which is *feræ naturæ*, and nobody has a right to interfere with him in doing so, until some mischief happens " (c). If the keeping of a thing be in fact *per se* wrongful, as where explosives are kept in breach of the regulations of the Explosives Act, the act of God would probably be no defence.

Foreign
enemies.

It seems to be generally admitted that the act of foreign or as they are generally termed " King's enemies " will equally with the act of God excuse a breach of a duty imposed by law (d). The ground upon which the exception of King's enemies rests seems to be that there is no remedy over against them. In the leading case on this subject it is laid down generally that " where the law creates a duty or charge, and the party is disabled to perform it without any default in him, *and hath no remedy over*, there the law will excuse him " (e). For the acts of war committed by the subjects of a state at war with this country there is no remedy over, such acts not being tortious. According to Story (f),

(a) *Per* Fry, J., *Nitro-Phosphate, &c., Co. v. London, &c., Dock*, (1878) 9 Ch. D. p. 515.

(b) *Per* Bramwell, B., *Nichols v. Marsland*, (1875) L. R. 10 Ex. p. 260.

(c) *Per* Platt, B. *Jackson v. Smithson*, (1846) 15 M. & W. p. 565.

(d) *River Wear Commissioners v. Adamson*, (1876) 1 Q. B. D. 546 ; 2

App. Cas. 743. For definition of " King's enemies," see *Russell v. Niemann*, (1864) 17 C. B. N. S., Byles, J., at p. 174.

(e) *Paradine v. Jane*, (1647) Aleyn. p. 27 ; and see *Miller v. Law Accident Insurance Co.*, (1902) 71 L. J. K. B. 557.

(f) Story on " Railments," s. 526.

pirates on the high seas come within the definition of "King's enemies," but this statement is of doubtful acceptance in English law.

It has, however, been decided that a British subject by adhering to the King's enemies, and taking out letters of naturalisation in a foreign country, after the country of adoption is at war with Great Britain, is guilty of high treason (a).

But for acts committed by any third persons not coming under the head of foreign enemies, however uncontrollable such acts may be, the author of a nuisance is probably not excused. On this principle it has been laid down with reference to the analogous duty of a gaoler to keep his prisoner safe at all hazards, that "if traitors break a prison it shall not discharge the gaoler, otherwise if the King's enemies of another kingdom; for in the one case he may have his remedy and recompense, and in the other not" (b). However irresistible a mob of rioters who carry off a prisoner may be, their acts afford no defence to the gaoler in an action for an escape (c). In an old case in the Year Book (d), it was ruled by Brian, C.J., that where the defendant placed his cattle on a common and the cattle were driven thereout on to the land of the plaintiff by the dogs of a third party, although under such circumstances as to give a cause of action to the defendant against the owner of the dogs, that fact afforded no excuse to the defendant. So too it has been held that one who is under a prescriptive liability to repair a fence, is bound absolutely, except in the case of damage by the act of God (e), to have a proper fence at all times, and that if a third party breaks down the fence, and before notice thereof, to the servient owner damage ensues to the adjoining owner from want of a proper fence, the servient owner will not be excused, for the prescriptive obligation to repair the fence

Acts of third parties who are not foreign enemies afford no excuse.

(a) *Rex v. Lynch*, (1903) 1 K. B. 144.

(b) *Southcote's case*, (1600) 4 Rep. 84 a.

(c) *O'Neil v. Marson*, (1771) 5 Burr. 2813; *Elliott v. Duke of Norfolk*, (1792) 4 T. R. 789.

(d) 20 Edw. IV. 11, pl. 10. See too *Bell v. Twentymen*, (1841) 1 Q. B. 766.

(e) In the case here referred to (see (1873) L. R. 8 Q. B. p. 278) the Court indeed used the expression "act of God, or *vis major*," but what they understood by the latter limb is not clear. Probably they treated the term *vis major* as synonymous with act of God, though possibly they may have intended to refer to foreign enemies.

"subjects him to all risks of injury that may be done to it by strangers or trespassers" (a). There are, however, on the other hand certain *dicta* to the effect that the acts of third parties, although not foreign enemies, may, if uncontrollable, be regarded as *vis major*, and consequently, will operate as a defence. Thus in *Nichols v. Marsland*, Bramwell, B., speaking of the liability of the owner of a reservoir for water escaping from it says: "Suppose a stranger let it loose would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be" (b). And this view no doubt is much the more satisfactory of the two, for the remedy which the defendant has over against the third party must in many cases be theoretical only, as where the damage is done by a mob of penniless rioters, but the authorities above cited to the contrary effect seem too strong to be got over.

Vis major
where no
remedy over.

The exemption from liability for the breach of any duty imposed by law, unlike the implied exception from the common law liability of a common carrier, is not limited to the act of God and the King's enemies, but includes any other species of *vis major* or inevitable accident in respect of which the defendant has no remedy over. Thus, where the plaintiff hired of the defendant the ground floor of a warehouse of which the latter occupied the upper floor, the rain water from the roof of which was collected by gutters into a box, and a rat gnawed a hole in the box, whereby the rain water without any negligence in the defendant flowed down through the hole and flooded the plaintiff's premises, the defendant was held not liable, one of the grounds of the decision being that the accident amounted to *vis major* (c). And again in *Walker v. British Guarantee*

(a) *Lawrence v. Jenkins*, (1873) L. R. 8 Q. B. 274. In one view of prescription, a prescriptive duty is a contractual duty rather than one imposed by law, but it is apprehended that this makes no difference as regards the limitation to be put on the extent of that duty, the terms of the supposed contract upon which the duty rests being left to the law to imply.

(b) (1875) L. R. 10 Ex. p. 259; *Ely Brewery Co. v. Pontypridd Urban Dist. Council*, (1904) 68 J. P. 3, C. A. See, too, the judgment of Kelly, C.B., in *Boa v. Jubb*, (1879) 4 Ex. D. p. 79. where, however, there was nothing to show that the offending water was the defendant's water.

(c) *Carstairs v. Taylor*, (1871) L. R. 6 Ex. 217. But damage done by rats

Association (a), a plea by a treasurer, that before he could pay over certain moneys received by him to the bankers of the association, he was, "without any default or negligence or want of due care on his part, robbed by violence of the whole of the said moneys"; was held by the Court to exonerate alike the defendant and his sureties from liability.

3. In all cases of physical injury arising from the use of property not coming under the heads already dealt with (b), the defendant will be liable if the injury be wilful (c) or caused by his negligence, but not otherwise.

NEGLIGENCE.

Negligence is the omission to take such care as under the circumstances it is the legal duty of a person to take. It is in no sense a positive idea, and has nothing to do with a state of mind. Being a mere negation, it is not the subject of degree, and the expression "gross negligence" has been condemned as amounting to nothing more than ordinary negligence "with the addition of a vituperative epithet" (d). Thus, if one of two persons, of whom the same degree of care is required, fails by the slightest degree to take the required amount of care, while the other takes no care at all, the latter is not more negligent than the former; the negligence of both is precisely the same.

But though there are no degrees of negligence, negligence being in all cases the same thing, namely, the absence of due care, there are undoubtedly degrees of care, a greater degree of care being due under one set of circumstances than under another; and the expression gross negligence, though inaccurate and possibly misleading, is a convenient phrase to express the idea that the degree of care required of the defendant was small (e). These degrees of care, however, it is impossible to define or

Degrees of care.

is in general no defence to an action on the contract of carriage (see *Dale v. Hall*, (1750) 1 Wils. 281; *Laveroni v. Drury*, (1852) 8 Ex. 166; *Kay v. Wheeler*, (1867) L. R. 2 C. P. 302), for it does not amount to the act of God.

(a) (1852) 18 Q. B. 277.

(b) Injuries arising from the use of land, or the keeping of beasts, fire, or

explosives.

(c) As to the meaning of the term "wilful," see above, pp. 7, 8.

(d) *Per* Rolfe, B., *Wilson v. Brett* (1843) 11 M. & W. p. 116; and *per* Willes, J., *Grill v. General Iron Screw Colliery Co.*, (1866) L. R. 1 C. P. p. 612.

(e) See *per* Lord Chelmsford, *Giblin v. M'Mullen*, (1868) L. R. 2 P. C. p. 337.

classify, for they are infinite in number, each special set of circumstances requiring its own particular degree; so that an exhaustive catalogue of the various degrees of care would be a simple enumeration of all the decided cases. It is in each case practically a question of fact for the jury, whether the proper degree of care has been taken—the jury being guided by considerations of what a reasonable and prudent man would have done under the circumstances (a).

Where, however, by the relationship existing between two parties a special duty to take care is either actually, or by implication, laid upon one of them, a breach of that duty, by the person from whom it is required, will render him liable in damages for any injury immediately resulting from such negligence (b).

Liability of
boarding-
house keeper
for loss of
boarder's
goods.

Thus, to take a concrete example, the defendant was held liable in the recent case of *Scarborough and Wife v. Cosgrove* (c), in which the plaintiff (who was staying as a guest at a boarding house), having locked up some valuables in a satchel placed the case in an unlocked drawer in her chamber, from whence it was stolen by another guest. The Court of Appeal ruling (d) that, a person who “carries on the business of a boarding house keeper for reward is bound to carry on that business with reasonable care, having regard to the nature and normal conduct of the business as known to the guest, or as represented to the guest by him; and if by reason of a breach of that duty the luggage of the guest is lost the boarding house keeper is liable for the loss to the guest.”

Requirement
of skill.

As no prudent person, unless possessed of competent skill, would undertake the doing of any act which in the absence of skill would cause great risk of injury to others, the doing of such acts by an unskilled person will amount to negligence. It is negligence in a person not skilled in the management of horses to ride or drive in a crowded thoroughfare (e). If a person is

(a) See above, pp. 13, 14, for definition of negligence given by Alderson, B., in *Blyth v. Birmingham Waterworks Co.*, (1856) 11 Ex. p. 784.

(b) *Phipps v. New Claridge's Hotel, Ltd.*, (1905) 22 T. L. B. 49.

(c) (1905) 74 L. J. K. B. 892.

(d) (1905) 74 L. J. K. B. 892. *Romer. L.J.*, at p. 898.

(e) *Hammack v. White*, (1862) 11 C. B. N. S. 588.

"driving his carriage, and from want of skill causes injury to a passer-by, he is of course responsible for that want of skill" (a). So too with the management of a railway train (b), or a ship, or machinery; in all such cases negligence includes want of competent skill.

And in the case of a professional person, or tradesman, or artificer, actually pursuing a profession or vocation which demands special knowledge, there is a presumption raised, amounting to an implied warranty in law, that such person is possessed of reasonably competent skill in the exercise of his particular calling (c).

Foremost among the class of cases in which, in the absence of wilfulness, negligence is an essential ingredient in liability, come cases of injury caused by chattels which, having been set in motion by the defendant, have come into collision with the plaintiff or his property. A street accident affords a familiar instance of liability of this kind. A person who has been run over by a carriage cannot recover against the owner unless the party in charge of the carriage was guilty of negligence in its management or of wilful misconduct (d). The most usual forms of negligence in the management of a vehicle are those of driving at an improper speed, or of driving on the wrong side of the road: The question of what speed is improper is of course one of degree, and one which is to some extent relative to the particular place and the extent to which it is frequented. Though being on the wrong side of the road is in general some evidence of negligence, it is slight evidence only, for the rule of the road is not by any means inflexible. A person driving a carriage is not bound to keep on the regular side of the road, but if he does not do so he is bound to exercise more care and keep a better look-out to avoid a collision than would be requisite if he were to confine himself to the proper side (e). Moreover, if a collision can be better avoided by going on the wrong side, it is not merely

Setting
chattels in
motion.

Collisions by
vehicles on
land.

(a) *Per cur.*, *Hutchinson v. York, Newcastle, &c., R. Co.*, (1850) 5 Ex. p. 350.

(b) *Hutchinson v. York, Newcastle, &c., R. Co.*, (1850) 5 Ex. 343.

(c) For a recent discussion on this question, see *Love v. Muck*, (1905) 92

L. T. 345; and Wyatt Paine on Bailments, p. 166 *sqq.*

(d) *Holmes v. Mather*, (1875) L. R. 10 Ex. 261.

(e) *Pluckwell v. Wilson*, (1832) 5 C. & P. 375.

justifiable to do so but obligatory (a). The rule of the road, such as it is, applies as well to saddle-horses as to carriages (b). It is the duty of a person driving over a crossing for foot-passengers at the entrance to a street to drive slowly and with caution (c). Pulling the wrong rein is evidence of negligence (d), so too is the spurring of a horse when it is within kicking distance of a passer-by (e). Again, it is evidence of negligence to leave a horse and cart unattended in the street, whereby accidents may occur from the horse moving on (f). The owner of a cart is bound to provide it with proper and sufficient tackle, and he is negligent if he does not; therefore where in consequence of a chain-stay of the defendant's cart breaking, the horse ran away and did damage, the defendant was held liable (g). But the mere fact of trying a riding-horse whose temper is unknown to the rider in a frequented thoroughfare is no evidence of negligence (h), nor is it such evidence to try carriage-horses in harness for the first time in a similar place (i). Nor does the mere unexplained bolting of a horse afford any evidence of negligence on the part of the person in charge of it (k). It is not negligence to drive cattle through the street of a town loose instead of leading them with halters (l).

Collisions by
ships.

As with collisions between carriages, &c., on land so with collisions between ships at sea; in the absence of proof of negligence or wilful misconduct (m) the owner of a ship which runs into

(a) *Clay v. Wood*, (1803) 5 Esp. 44.

(b) *Turley v. Thomas*, (1837) 8 C. & P. 103.

(c) *Williams v. Richards*, (1852) 3 C. & K. 81.

(d) *Wakeman v. Robinson*, (1823) 1 Bing. 213.

(e) *North v. Smith*, (1861) 10 C. B. N. S. 572.

(f) *Snee v. Durkie*, (1903) 6 F. 42 Ct. of Sess.; *Illidge v. Goodwin*, (1831) 5 C. & P. 190. The common practice is to speak of certain kinds of acts as negligent acts, and not merely as evidence of negligence, but it is apprehended that negligence can never be predicated of an act as matter of law, the character of the act being in each case a question for the jury. Even though the inference of want of due care be irresistible, still the judge can-

not withdraw the question of negligence from the jury, and if the jury choose perversely to find that there was no negligence, the only remedy is an application to the Court of Appeal; see below, pp. 511—513.

(g) *Welsh v. Lawrence*, (1818) 2 Chit. 262.

(h) *Hammack v. White*, (1862) 11 C. B. N. S. 588.

(i) *Holmes v. Mather*, (1875) L. R. 10 Ex. 261. The earlier case of *Michael v. Alestree*, (1676) 2 Lev. 172, must be treated as overruled.

(k) *Hammack v. White*, *supra*; *Manzoni v. Douglas*, (1880) 6 Q. B. D. 145.

(l) *Tillett v. Ward*, (1882) 10 Q. B. D. 17.

(m) As to what constitutes negligence and misconduct in recent cases see

another cannot by the common law be held responsible. The fact that the collision was due to inevitable accident, as where it occurred solely from the darkness of the night and inability to see the other ship's lights (*a*), or from the density of the fog (*b*), will excuse. Where it is the duty of a ship under the regulations for preventing collisions at sea (*c*), to keep out of the way of another, but she is unable to do so by reason of her having been disabled in a former collision, and the other ship being unaware of her disabled condition keeps her course, if a collision ensues the former will be excused on the ground of inevitable accident (*d*), unless, indeed, the earlier collision was due to her own default, in which case, it may be that her disabled condition will afford no defence, on the same principle as that on which a defendant is not allowed to plead his own intoxication. There are cases, however, in which the mere fact of the collision raises a *prima facie* presumption of negligence, as where a vessel is run down while at anchor (*e*) ; in such case " the vessel under weigh is bound to show by clear and indisputable evidence that the accident did not arise from any fault or negligence on her part ; and for this obvious reason, that a vessel lying at anchor has no means of shifting her position or escaping the collision " (*f*). So, also, where one vessel is lying to, the burden of proof is on the other having the wind free, to show how she came into contact (*g*).

Another familiar instance of the setting of a chattel in motion is the firing of a gun ; if the defendant is guilty of negligence in the firing of it he will be answerable, but otherwise not, unless he fired at the plaintiff wilfully (*h*). What constitutes negligence in firing will necessarily be relative to the time and place. " If a

Firing guns.

Greenock Steamship Co. v. Maritime Insurance Co., (1903) 2 K. B. 657, C. A. (Negligence of Master) ; *The Challenge & The Duc d'Aumale*, (1905) 74 L. J. P. 55. (Fog, tug towing another vessel) ; *The Britannia*, (1905) P. 98 ; *The General Havelock*, (1905) 21 T. L. R. 438 ; *The Circe*, (1905) 21 T. L. R. 525. Collision both ships to blame.

(*a*) *The Shannon*, (1842) 1 W. Rob. 463.

(*b*) *The Marpesia*, (1872) L. R. 4 P. C. 212.

(*c*) Made by Order in Council under

the Merchant Shipping Act, 1894.

(*d*) *The Aim*, (1873) 2 Mar. Law Cas. (Aspinall) N. S. 96.

(*e*) *The Bothnia*, (1860) Lush. 52 ; *The Merchant Prince*, (1892) P. 9 ; *The Mediana*, (1899) P. 127.

(*f*) Per Dr. Lushington, *The Batavier* (1845) 2 W. Rob. p. 407 ; see *The Indus*, (1886) 12 P. D. 46.

(*g*) *The Eleanor*, (1865) 2 Mar. Law. Cas. O. S. 240.

(*h*) *Stanley v. Powell*, (1891) 1 Q. B. 86. And see above, p. 8.

man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused ; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots " (a).

Launching
vessels.

Another instance is that of launching a vessel. " The law throws upon those who launch a vessel the obligation of doing so with the utmost precaution, and giving such notice as is reasonable and sufficient to prevent any injury happening from the launch " (b). And where, as in the Mersey, it is usual to have a tug in attendance decorated with flags, to indicate that a launch is imminent, no less precaution will be sufficient (c).

Lowering and
raising bales
of goods.

So, again, those who are engaged in lowering or raising bales of goods above a spot where others are likely to be passing by, have a duty cast upon them to take reasonable care ; and this is equally so whether the spot in question be a public highway (d) where all members of the public have a right to go, or private property where no person has a right to be without the permission of the owner (e), provided it be a place where the defendant has reason to expect that others may be passing at the time (f).

Duty towards
trespassers.

This duty to take care not to cause physical injury by the setting of a chattel in motion is a duty which is owed towards all persons, even to those who are wrongfully in the place where the accident happens (g). If a man wrongfully leaves his property lying in the middle of the high road that will not excuse another for negligently driving over it (h). If persons trespass in a wood where the owner happens to be shooting at the time, the fact of their being trespassers will not relieve him of the obligation to take care not to shoot in the direction where he knows them to be passing. The driver of a train is bound to take care not to run over a person who is trespassing on the

(a) *Per* Blackburn, J., *Smith v. London & South-Western R. Co.*, (1870) L. R. 6 C. P. p. 22.

(b) *Per* Sir R. Phillimore, *The Andalusian*, (1877) 2 P. D. p. 233.

(c) *The George Roper*, (1883) 8 P. D. 119.

(d) *Byrne v. Bodle*, (1863) 2 H. & C. 722.

(e) *Scott v. London Dock Co.*, (1865)

3 H. & C. 596.

(f) *Batchelor v. Fortescue*, (1883) 11 Q. B. D. 474.

(g) For standard of care and skill required in avoiding damage to property of trespasser, see *Petrie v. Rastrev. Owners*, (1898) 2 Ir. R. 556, C. A.

(h) *Davies v. Mann*, (1842) 10 M. & W. 546 : *Mayor of Colchester v. Brook*, (1845) 7 Q. B. 339.

line; and by parity of reasoning a railway company by whose negligence a collision has occurred will probably be liable for injury caused to a passenger in the colliding train whom they know to be there, none the less because his presence there is a trespass by reason of his having fraudulently travelled without a ticket. The mere fact that a man obtains admission into a train as a passenger on the fraudulent pretence that he is a season ticket-holder when he is not, will, it is conceived, not relieve the company from responsibility towards him for negligent acts of misfeasance. It will not make him *caput lupinum*. In one case (a), indeed, Blackburn, J., suggested that where the passenger has omitted to take a ticket, not by accident but from fraud, even though the company know him to be in the train, there is no duty on them to carry him safely, but this *dictum* must probably be understood as limited to accidents arising from defects in the plant, premises, or permanent way, liability in respect of which cannot arise independently of the contract of carriage, and not as extending to acts of commission such as that of dashing the train in which he is against some obstructing body (b). No doubt the fact of the plaintiff being a trespasser will materially affect the question whether the defendant has been guilty of a want of care, for the setting of a chattel in motion in a place where no person is likely to be does not argue any want of care (c), and *prima facie* persons are not likely to be in a place where they have no right to go; but if the defendant knows that persons are likely to be passing through the *locus in quo* he is equally bound to take care whether those persons are rightfully so passing or not.

To render a person liable for damage caused by the setting of a chattel in motion it is not necessary that he should have

What is a setting in motion.

(a) *Austin v. Great Western R. Co.*, (1867) L. R. 2 Q. B. p. 446.

(b) As to this distinction between misfeasance and nonfeasance, see *Taylor v. Manchester, &c., R. Co.*, (1895) 1 Q. B. 134. The judgment of Thesiger, L.J., in *Foulkes v. Metropolitan District R. Co.*, (1879-80) 5 C. P. D. p. 170, where he refused to recognise any distinction "between the commission of an

act which is in itself wrongful, and the omission of some act to which the company would admittedly be bound if the passenger were carried by them under a contract," must be regarded as overruled by that case. As to what amounts to a misfeasance, see *Kelly v. Metropolitan R. Co.*, (1895) 1 Q. B. 944.

(c) *Batchelor v. Fortescue*, (1883) 11 Q. B. D. 474.

directly done the act himself which set it in motion, or authorised the doing of it by another; it is enough if, the thing in question being of an unstable character and liable readily to be set in motion, such as the contents of a loaded gun, or an unattended horse and cart, has been negligently left in a place where he knows it to be extremely probable that some other person will set it in motion (a). Therefore where the defendant sent a young girl to fetch a loaded gun and she in play pointed it at the plaintiff, drew the trigger and wounded him, the defendant was held liable (b). In *Williams v. Eady* (c), the defendant, a schoolmaster, allowed a bottle containing a stick of phosphorus to be lying about in his conservatory to which the pupils had access, and one of the pupils, finding the bottle, played with it, with the result that it exploded and injured the plaintiff, a fellow pupil: on a finding by the jury that the defendant was negligent in so leaving the bottle lying about where the boys could get at it, he was held liable. It has indeed been said, that a man is liable if he negligently leaves his horse and cart unattended in the street and a passer-by whips the horse and causes it to move on and a collision ensues (d). In a recent case it was held that the mere fact of a horse (harnessed to a cart) running away in the day time was *prima facie* evidence of negligence in its owner (e). In order, however, for liability to accrue for the results of negligence by relation, it is apparently essential, that the neglect with regard to the particular duty should be in itself the effective cause of the accident. Thus in *McDowall v. Great Western Ry.* (f) (in which trucks, with the brakes screwed down, were left unguarded on an incline plane), it was held, by the Court of Appeal, that the defendants were not liable for an accident, caused by trespassers releasing the brakes and setting the trucks in motion, although they were aware that boys were in the habit of trespassing on the siding and meddling with the trucks. It is, however, submitted that the principle governing

(a) See *per* Lord Denman, C.J., *Lynch v. Nurdin*, (1841) 1 Q. B. p. 35; and see *Sullivan v. Creed*, (1904) 2 Ir. R. 317, C. A.

(b) *Dixon v. Bell*, (1816) 5 M. & S. 198.

(c) (1893) 10 Times L. R. 41.

(d) *Illidge v. Goodwin*, (1831) 5 C. & P. 190. But see above, pp. 146, 147.

(e) *Snee v. Durkie*, (1903) 6 F. 42. Ct. of Sess.

(f) (1903) 2 K. B. 331; and see *Caledonian R. Co. v. Mulholland*, (1898) A. C. 216.

this decision is not one that should be extended (a). In a recent case (b) in which owing to the nature of the accident (an explosion) the immediate cause of the disaster was unascertainable it was held by the Privy Council that evidence of negligence on the part of the defendants in failing to supply suitable machinery and take proper precautions (thus probably conducing to the result) was relevant to the issue, and rendered them liable to the plaintiff.

A second class of cases in which a person will be liable for negligently causing physical injury to another, consists of those in which he has negligently created a source of danger into contact with which the plaintiff has lawfully come and so coming has injured himself. In some such cases the defendant may not be aware that he has created any source of danger at all, as where a chemist by mistake compounds a medicine with the wrong drugs, in which cases the negligence may be said to consist in bringing the dangerous thing into existence. In other cases he may know of the existence of the source of danger but forget to give due warning of it, as where persons engaged in repairing a road omit to place lanterns upon the spot at night to indicate that the road is up, or where the consignor of a carboy of nitric acid neglects to give the carrier notice of the dangerous character of the parcel, in which cases the negligence consists in the omission to give due warning (c).

Negligent
creation of
source of
danger.

For the purposes of a civil action, however, there is no such thing as negligence in the abstract; actionable negligence consists in the neglect of the use of care towards a person towards whom the defendant owes the duty of observing care; and in actions for negligence of the class now under discussion the difficulty of fixing the defendant with liability arises mainly in connection with the question whether the defendant owed any such duty as towards the plaintiff. But it has been laid down as a proposition to be deduced from the authorities that "when- ever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did

Towards
whom the
duty to take
care exists.

(a) See *Sullivan v. Creed*, (1904) 2 Ir. R. 317, C. A.

(b) *Mc Arthur v. Dominion Cartridge Co.*, (1905) A. C. 74.

(c) As to the negligent communication of infectious diseases, see below, pp. 492 *sqq.*

think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger" (a). Consequently when the dangerous state of things consists of an obstruction upon a high road, the duty to take care that injury shall not result therefrom is a duty which is owed towards all members of the public, for all persons have a right to pass along the high road (b).

Duty towards person to whom goods are supplied for use.

"Whenever one person supplies goods or machinery or the like for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing" (c).

An interesting exemplification of the principle is to be found in the case of *Chapronier v. Mason* (d), in which the plaintiff brought an action against the defendant (a confectioner) for

(a) *Per* Brett, M.R., *Heaven v. Pender*, (1883) 11 Q. B. D. p. 509. The proposition so stated appears to be somewhat too wide, for it would include cases of damage caused by a natural user of land. But it was evidently intended to be read in connection with the class of cases now being discussed, where by reason or some act of omission of the defendant, the plaintiff has been caused to injure himself. The majority of the Court of Appeal in *Heaven v. Pender*, (1883) 11 Q. B. D. 503, though not expressly dissenting from the rule so stated by Brett, M.R., thought that the facts of that case did not render it necessary to lay down so wide a proposition. They preferred to rest their judgment upon another ground, as to which see below, p. 489. In the subsequent case, however, of *Thrusell v. Handyside*, (1888) 20 Q. B. D. p. 363, the proposition of Brett, M.R., received the approval of Hawkins, J., who said

that in his opinion it was "a correct statement of the law." In the still later case of *Le Lierre v. Gould*, (1893) 1 Q. B. p. 497, Lord Esher himself offers an explanation of the effect of *Heaven v. Pender*, in which he apparently treats the injury in that case as having been due to a misfeasance analogous to that of reckless driving along a high road. In such a description it is difficult to recognise *Heaven v. Pender*, as to the facts of which case see below, pp. 472, 473. It is submitted that the Master of the Rolls' original judgment is to be preferred to his explanation.

(b) *Shoreditch Corporation v. Bull*, (1904) 20 T. L. R. 254, H. L.

(c) *Per* Brett, M.R., *Heaven v. Pender*, (1883) 11 Q. B. D. p. 510.

(d) (1905) 21 T. L. R. 633; see also *Frost v. Aylesbury Dairy Co.*, (1905) 1 K. B. 608, C. A.

injuries caused to his teeth and mouth by a stone in a bath bun which he had purchased at the defendant's shop. Plaintiff's case was that the presence of the stone in the bun was due to negligence, and that, as there was an implied warranty in the article sold, the defendant was liable to pay him compensation. At the trial the jury found, in answer to questions left to them by the judge, that there was no negligence on the part of the defendant or his servants in the manufacture of the Bath bun, that the bun was reasonably fit for the purposes of being eaten in the usual way, that the bun was of merchantable quality, and that the amount of damage the plaintiff sustained by reason of the presence of the stone in the bun, in case it was a question of damages, was 5*l*. On these findings judgment was entered for the defendant. Upon the plaintiff appealing on the ground that the findings of the jury were against the weight of evidence, their Lordships held that the plaintiff had made out a *prima facie* case of negligence, that the Judge in the court below had misdirected the jury, and that the case must go down for a new trial.

So, too, "a person who gives another goods to carry, goods which require more care and caution than ordinary merchandise, and which are likely, in the absence of such caution, to injure persons handling them, is bound to give notice of their dangerous character to the party employed to carry them, and is liable for the consequences which are likely to ensue from the omission to give such notice" (a). Thus, where the defendants packed chloride of lime in casks and delivered the casks to the plaintiffs for shipment without disclosing the dangerous character of the contents, and the plaintiffs stowed the casks in the hold of their vessel where the lime did mischief, the defendants were held responsible (b). In such a case, no doubt, where the question is between two parties to a contract, such as consignor and carrier or vendor and purchaser, there is a contractual duty to take care arising out of the implied terms of the contract of carriage or sale as the case may be, but there is also a concurrent duty independent of contract. "The existence of a contract between

Duty towards persons to whom goods are delivered for purposes of carriage.

(a) *Per Willes, J., Farrant v. Barnes*, (1862) 11 C. B. N. S. p. 563.

(b) *Brass v. Maitland*, (1856) 6 E. & B. 470.

two persons does not prevent the existence of the suggested duty between them also being raised by law independently of the contract, by the facts with regard to which the contract is made" (a).

Limits of
duty.

Where goods are supplied or delivered by one person to another to be used, carried, or otherwise dealt with, the existence of a duty in the former to take care that injury shall not ensue from their being dealt with in the manner intended, is, as above stated, confined to cases in which they are supplied or delivered "under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill," there will be danger of injury to the person for whose use the thing is supplied. The first question then to be determined is, what are those circumstances? They would seem to fall under three classes:—1. Where the goods are supplied under a contract for consideration. 2. Where the person supplying them is known to have such superior knowledge or skill in relation to the subject-matter that the other party is likely to rely on such knowledge or skill having been used. 3. Where the party supplying them knows of some hidden source of danger connected with them.

Where the goods are delivered under a contract, in the sense that a consideration passes to the party delivering them, as where they are sold, or delivered for purposes of carriage, it will undoubtedly be reasonable for the party receiving them to assume that care has been taken, and a duty to the other to take care will consequently arise. But the existence of a contract, in the sense of the passing of a consideration, is presumably not essential to the creation of such a duty. For instance, if a chemist gratuitously compounds a medicine for a friend, he must know that the other, if ignorant of the nature of drugs, will rely upon his taking care not to use wrong drugs, which reliance will presumably give rise to a duty to take care and render him liable for any damage that may result from his carelessness. Where a thing is gratuitously given or lent by one person to another it is the duty of the lender "to communicate to the borrower defects in the article lent of which he is aware, and if either deliberately

(a) *Per Brett, M.R., Hearen v. Pender*, (1883) 11 Q. B. D. 503; *supra* p. 466.

or by gross negligence he does not discharge this duty, he is liable for injury resulting to the borrower" (a). If, however, the thing is of such a character that the one party has as good means of judging of its condition as the other, it would be unreasonable for the gratuitous recipient to rely upon care having been taken; he ought to examine the thing for himself. There will consequently in such a case be no duty in the donor or lender to take care. Thus, where the defendant gratuitously lent to the plaintiff a scaffold a portion of which was rotten, and the plaintiff while using the scaffold fell and was injured in consequence of the rotten portion giving way, it was held that the defendant, not having had actual knowledge of the defect, was not responsible, notwithstanding that in the opinion of the jury he might have discovered it by the exercise of ordinary care (b). Similarly, where a gratuitous licence is given to a person to go upon and use premises of the licensor, it would be unreasonable in him to rely upon the licensor having taken care to have the premises in a safe condition, for if he keeps his eyes open he can form as good an opinion himself as can the owner (c). Though where an invitation to enter upon premises for the purpose of viewing them is given by a landlord or his agent to a prospective tenant, there is a duty laid upon the licensor to see that the premises are reasonably safe, or at all events free from concealed danger (d). And where, as in the case of the chemist put above, the plaintiff's means of forming an opinion as to the condition of the thing supplied are, to the knowledge of both parties, so inferior to those of the defendant that it may fairly be assumed *à priori* that the plaintiff will trust entirely to the defendant's judgment, then a duty to take care must arise, and none the less because the case is one of gift or gratuitous loan. And with regard to the third class of cases, there is ample authority that the party supplying the goods is bound to take care to disclose any hidden

(a) *Coughlin v. Gillison*, (1899) 1 Q. B. 145; Collins, L.J., at p. 149, C. A.

(b) *Macarthy v. Young*, (1861) 6 H. & N. 329. This judgment indeed lays it down that a gratuitous lender is never bound to take any care, but that proposition is wider than the facts of

the case demanded, and in the light of other decisions is obviously incorrect.

(c) See *Iray v. Hedges*, (1882) 9 Q. B. D. 80.

(d) *Wright v. Lefever*, (1903) 51 W. R. 149, C. A.; and see *Harris v. Perry*, (1903) 2 K. B. 219.

with a paregoric label on it, who took it back to the woman, and she administered to the child what would have been a proper dose had the contents been paregoric as she supposed, and the child immediately died from the effects, upon the apprentice being indicted for manslaughter, Bayley, J., directed the jury that if they thought he had been negligent they must convict (a). This amounted to a direction that the circumstances created a duty to take care as towards persons who might take or have administered to them the contents of the bottle on the faith of the label being correct, although such persons were no parties to the contract of sale, nor expressly contemplated by the vendor as parties for whose use the purchase was made. From which it follows that for a breach of that duty the child, if, instead of being killed, it had been merely injured in health, would have had an action for damages. The civil consequences of a wrongful act may possibly be wider, but they cannot be less wide than its criminal consequences. And in an American case (b), it was held that a manufacturer of drugs who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into the market, is liable in damages to all persons who are injured by using it as such medicine in consequence of the false label, however many intermediate sales it may have passed through before it reached the hands of the person injured. In that case, indeed, the Court expressly rested the defendant's liability on the ground that his act in putting on the wrong label was imminently dangerous to human life; but why liability should, as towards strangers to the contract, be limited to cases in which the negligent act is likely to cause death, and not to be extended to cases in which it is likely to cause injury of other kinds, it is difficult to see. The fact that one kind of article is likely to produce damage of a less degree than another may be a good reason for requiring a less degree of care to be taken, but seems to afford no reason for limiting the class of persons towards whom the duty to take that care is owed (c). Where the defendant, a dockowner, under a

(a) *Tessymond's case*, (1828) 1 Lewin, C. C. 169.

(b) *Thomas v. Winchester*, (1852) 6 New York Rep. 397.

(c) This principle must obviously

apply to all cases of sales of patent medicines or drugs sold ready made up, as distinguished from medicines compounded on the particular occasion according to a special prescription.

contract with the owner of a ship which was being repaired in the dock, supplied and put up outside the ship a staging to enable it to be painted, which staging, owing to the defendant's negligence, was in a defective condition at the time when it was so supplied, and the plaintiff, a workman in the employ of a painter who had contracted with the shipowner to paint the ship, went upon the staging for the purpose of doing the painting, whereupon the staging gave way and he was injured, the defendant was held liable, although at the time of the accident the staging was under the control of the shipowner and not of the defendant (a). Again, where the defendant, a charterer (who had received, from the owner, a charter party stating that the ship was in good and fit condition) bargained with a stevedore to load cargo; and one of the stevedore's men (the plaintiff in the action) in order to get down into the main hold, put his foot on the top rung of a fixed iron ladder, which was in so defective a condition, that he was precipitated into the hold and seriously hurt; the defendant was held liable (b). The principle underlying this and cognate decisions being that there is an imperative duty laid upon any occupier or possessor of premises, who invites people to come upon the property for purposes of work or business (in which he is interested) to see that due care has been exercised in the construction and maintenance alike of the principal structure, and of all appliances necessary for the due execution of the particular employment or business in respect of which he has invited the persons to enter upon the property, nor can he discharge this duty by merely contracting with competent people to do the work for him. Thus, too, where the defendant, a colliery owner, consigned coals to his customers by rail in his own trucks and through the negligence of his servants one of such trucks was allowed to leave the colliery in a defective state, and in consequence of the defect injury was occasioned to the plaintiff, one of the customers' servants, who was employed in unloading the coals and had got

Whether it would also apply to the latter is doubtful, because it is not customary for a patient, for whom a medicine has been specially prescribed, to hand it over for use to another person.

(a) *Heaven v. Pender*, (1883) 11 Q. B. D. 503; and see *Traill v. Actiesels-*

kabab Dalbeattie Ltd., (1904) 6 F. 798, Ct. of Sess. But see *Eurl v. Lubbock* (1905) 74 L. J. K. B. 121.

(b) *Marney v. Scott*, (1899) 1 Q. B. 986; *Harris v. Perry*, (1903) 2 K. B. 219.

Injured party must be one of a class of persons by whom defendant contemplated the thing being used.

the defendant in the case of *Heaven v. Pender*, above referred to, would have been under no liability towards a person who used the staging for a purpose which would have subjected the ropes to a greater strain than they would have been subjected to if used for the purpose of painting the ship. Again, if a thing though dangerous if used by one class of persons, is not dangerous if used by another, the party issuing it will not be responsible for damage resulting from its use unless he contemplated its being used by the class of persons to which the plaintiff belonged (a).

"Suppose, for example, a chemist sells to a customer a drug, without any knowledge of the purpose to which it is to be applied, which is fit for a grown person, and that drug is afterwards given by the purchaser to a child, and does injury, it could not be contended that the chemist was liable" (b). But subject to these limitations, that the plaintiff must have acted reasonably in assuming that care had been taken to prevent injury, and that the thing must have been used in the mode in which, and by the kind of person by whom, it was intended to be, or contemplated as likely to be used, it seems that the party negligently issuing the dangerous thing will be liable to *any* person who may be injured by reason of that negligence, whoever that person may be (c). And it is apprehended that this rule applies wherever the case falls within any one of the three classes above mentioned (d), in which the party issuing the dangerous thing would

(a) And *à fortiori* this rule applies when the article was not intended for the fool of man: *Wieland v. Butler Hogan*, (1904) 73 L. J. K. B. 512.

(b) *Per* Pigott, B., *George v. Skirington*, (1869) L. R. 5 Ex. p. 4.

(c) In the above cited case of *Heaven v. Pender*, ((1883) 11 Q. B. D. pp. 510, 515), it is said that where a person supplies goods for use, the law (apart from contract) imposes an obligation to take care that they are in a condition to be safely used only where they are intended to be used *immediately*. This, however, must be read in connection with the class of goods with which the Court was then dealing, goods which were likely to deteriorate with lapse of time, by exposure to the weather or other causes, and with respect to which,

if an accident happened only after a considerable interval of time, it would be right to caution the jury against finding that their original faulty condition was the cause of the accident. Where, however, it can be demonstrated that no change has taken place in the condition of the goods in the interval between the supply and the accident, the length of that interval must be perfectly immaterial. If, for instance, a chemist supplies a poison in a sealed bottle as and for a harmless drug, and the purchaser does not open it for a year, the lapse of time cannot affect the liability of the vendor, for length of time cannot convert one drug into another, though it may convert a sound rope into a rotten one.

(d) pp. 468 *sqq.*

be liable to the immediate person to whom he issued it, that is to say, that it applies not merely where the thing was issued under a contract for consideration, but also where the party issuing it knew of some concealed source of danger, or was a person of such known superior skill as would naturally induce the other party to rely upon it.

Where the original transaction under which the dangerous thing is issued is a gift, it is presumed that the donor will stand in precisely the same position as a vendor, and will be liable to any third persons to whom the donee may give, lend, or sell the subject-matter of the gift, for any injury resulting from his non-disclosure of any dangerous quality which he may know that it possesses. But where the original transaction is a loan it seems that the rule is otherwise, for the lender of a chattel does not as a rule contemplate the borrower lending it again to third parties, a loan being in its nature personal, and it being intended that the thing lent shall be returned *in statu quo*. Though the lender is as towards his immediate borrower liable for non-disclosure of dangerous qualities, he is under no corresponding liability towards strangers to whom the borrower may lend the thing. Therefore, where the defendants, a railway company, were possessed of a crane at one of their stations, the gratuitous use of which crane they allowed to the consignees of goods sent by rail to such station, and the servants of a consignee, who were engaged in using the crane, requested a passer-by to assist in raising it, and whilst he was so doing the chain of the crane being defective broke and killed him, the defendants were held not liable to his representatives, although the defective condition of the chain which was the cause of the accident was known to them (a).

Loan of
dangerous
chattel.

There are two cases which have sometimes been regarded as negating the view above put forward (b), but on examination it will be seen that they in reality do not. The first is *Winterbottom v. Wright* (c). There a declaration was held bad on demurrer which alleged that the defendant had contracted with the Post-

Cases of
Winterbottom
v. Wright
and *Longmead*
v. Holliday
discussed.

(a) *Blakemore v. Bristol & Exeter R. Co.*, (1858) 8 E. & B. 1035; and see *Earl v. Lubbock* (1905) 1 K. B. 253.

(b) pp. 471 *sqq.*

(c) (1842) 10 M. & W. 109.

master-General to provide a coach to carry the mails along a certain line of road, and had agreed that during the contract the coach should be in a fit and secure condition for the purpose, that one Atkinson had contracted with the Postmaster to supply horses and coachmen for the coach, that the plaintiff hired himself to Atkinson to drive the coach, and that the defendant so negligently conducted himself and so disregarded his contract, that while the plaintiff was driving the coach it broke down in consequence of certain latent defects in its condition, and the plaintiff was thrown off and injured. But the statement that the accident was caused by a *latent* defect is inconsistent with its having been the result of negligence. It is quite consistent with that decision that had the defendant been the manufacturer of the coach, and negligently constructed it of improper materials, the plaintiff would have had a good cause of action. There was there, as between the defendant and the Postmaster, assumed, rightly or wrongly (*a*), to exist an absolute contract to provide a sound coach, and the declaration was nothing more than an attempt to sue on that contract by a person who was a total stranger to it. The other case is that of *Longmeid v. Holliday* (*b*), where the defendant sold a lamp to the plaintiff's husband to be used by him and his wife, which lamp, upon being used in the ordinary way, owing to its defective construction burst and injured the plaintiff. The jury having found that the defendant, who did not himself manufacture the lamp, sold it in good faith and in ignorance of the defect, it was sought to rest the claim upon the breach of an implied warranty of fitness which it was assumed (*c*) existed towards the husband. The Court held that the plaintiff could not recover; but this again was merely an attempt to sue on a contract by a person not party to it. There was no suggestion of any negligence on the part of the defendant, and on this ground Kelly, C.B., distinguished the case in *George v. Skirvington* (*d*). The decision itself cannot be regarded as any authority for the proposition stated in the headnote, that a

(*a*) See *Redhead v. Midland R. Co.*, (1869) L. R. 4 Q. B. 379.

(*b*) (1851) 6 Exch. 761; see also *Gordon v. McHardy*, (1903) 6 F. 210 Ct. of Sess.

(*c*) As to the law on this point, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14.

(*d*) (1869) L. R. 5 Ex. p. 4.

tradesman who contracts with an individual for the sale to him of an article to be used for a particular purpose by a third person is not, in the absence of fraud, liable for injury caused to such person by some defect in the construction of the article (a). Indeed the notion that fraud on the part of the vendor would in such a case better the position of the plaintiff, seems to be founded on a misconception; for it is essential in an action for fraud that the defendant should have intended to deceive the plaintiff (b), and it is obvious that in such a case as *Longmeid v. Holliday* the defendant did not so intend, for he had nothing to gain by the plaintiff's using the lamp at all (c).

In all the cases above referred to the injury which the plaintiff complained of as the result of his using the thing issued by the defendant in the manner intended was a physical injury. In *Cann v. Willson* (d) an attempt was made to extend the principle of those cases to a case in which the injury resulting from the intended user was, from the very nature of the thing, not physical, but pecuniary, only. There, an intending mortgagor, at the request of the plaintiff, the intending mortgagee, applied to the defendants, a firm of valuers, for a valuation of the property proposed to be mortgaged, and the defendants, knowing that the valuation was intended for the use of the mortgagee, negligently over-valued the property, whereby, on the mortgage being carried out, the plaintiff sustained damage. Chitty, J., held the defendants liable on the principle of *George v. Skivington* (e). He was of opinion that as the valuation, if used in the way in which it was intended to be used, would be likely to produce damage unless it was carefully made, it was just as much a dangerous thing as was the hair-wash in the case referred to. However, in *Scholes v. Brook* (f), where a similar question arose, Romer, J. refused to follow *Cann v. Willson*. He there said, "Cases have been cited which, it is said, establish such a liability. But, apart from *Cann v. Willson*, it appears to me that the authorities may be divided into two classes. One of those classes is where one

Distinction
where injury
not physical.

(a) And see *ante*, pp. 471 *sqq.*

(b) See *Peek v. Gurney*, (1873) L. R. 6 H. L. 377.

(c) See discussion on this subject below, at p. 545.

(d) (1888) 39 Ch. D. 39. But see

Love v. Mack, (1905) 92 L. T. 345.

(e) (1869) L. R. 5 Ex. 1.

(f) (1891) 63 L. T. N. S. 837.

occupied a brewery and office and a passage leading thereto from the public street, which passage was the usual means of access for customers going to and from the office, and the defendant negligently allowed a trap-door in the floor of the passage to remain open without being properly lighted or guarded whereby a customer passing along the passage fell through the trap-door, it was held that an action lay (a). So the owner of premises owes a duty towards those whom he invites there, to take care to see that the premises are in a fit state of repair, and if, owing to his omission to exercise care in that respect, bricks or tiles or other portions of the structure of the building fall upon them he will be liable.

Duty of owner to give person coming on business notice of concealed danger.

In deference to conventional usage, the duty of an owner of premises towards persons coming there on business is spoken of as a duty to take care that they are reasonably in a safe condition. This, however, is not strictly accurate. The duty is an alternative one, to make the premises safe *or* to warn. If a person driving along a highway is damaged by an obstruction wrongfully placed there the action lies for the wrongful act in causing the obstruction; and though the defendant has given the plaintiff warning of the obstruction that will not necessarily relieve him of liability (b): but if the plaintiff suffers similar damage in driving along a private road the cause of action is really very different; for there is nothing wrongful in the owner of a private road making it unsafe by placing an obstruction on it; his duty is discharged by giving due warning of the obstruction. In *Indermaur v. Dames* (c), Willes, J., in discussing the duty owed towards licensees coming on business, said: "Where there is evidence of neglect, the question whether such reasonable care has been taken by *notice*, lighting, guarding or otherwise, must be determined by a jury as a matter of fact." And in the same case in the Exchequer Chamber (d), Kelly, C.B., said: "Is he (the occupier) not bound either to put up some

Dames, (1866) L. R. 1 C. P. p. 288, and see *Marney v. Scott*, (1899) 1 Q. B. 988; see *supra*, p. 473.

(a) *Chapman v. Rothwell*, (1858) E. B. & E. 168. See also *Indermaur v. Dames*, (1866-7) L. R. 2 C. P. 311.

(b) *Clayards v. Dethick*, (1848) 12 Q. B. 439; see also *Lux v. Corporation of Darlington*, (1879) 5 Ex. D. 28.

(c) (1866) L. R. 1 C. P. at p. 288.

(d) (1866-7) L. R. 2 C. P. at p. 313.

fence or safeguard about the hole, or, if he does not, to give such workmen *a reasonable notice* that they must take care and avoid the danger? I think the law does impose such an obligation upon him." In *White v. Phillips*, (a); where the condition of a campshed under water rendered the berth alongside a wharf dangerous, Erle, C.J., said (b) that a duty was cast on the wharfingers towards the owners of vessels using the berth, "either *to give notice* of the danger arising from the campshed being there in that state, or to have had it repaired and properly constructed." So too in *The Moorcock* (c), Lord Esher, M.R., speaking of the duty of wharfingers with respect to the condition of their berths, said that "they should take reasonable care to find out in what condition the bottom is, and then either have it made reasonably fit for the purpose, or *inform* the persons with whom they have contracted that it is not so." This duty to warn, in cases in which the source of danger is not due to something done by the owner, but is simply the result of non-feasance, as where premises have got into a state of disrepair, involves as towards persons coming on business the earlier duty to take care to acquire knowledge of the unsafety, without which knowledge the warning cannot be given. The breach of duty then which will render an owner of premises liable to a person coming there on business consists either in (1) neglecting to give warning of hidden sources of danger which are known to him (d) or in (2) omitting to take proper precautions to acquire knowledge of the danger, and, having acquired it, to give proper warning. As towards bare licensees not coming on business the owner is liable only for negligence of the first kind. But as towards either class of licensees the owner, having given due warning, is free from all responsibility (e).

The liability of an owner of land for injury caused by

(a) (1864) 33 L. J. C. P. 33.

(b) 8. C. p. 36.

(c) (1889) 14 P. D. at p. 67. And see *Butler v. M'Alpine*, (1904) 2 Ir. R. 445. C. A.

(d) Thus the owner of premises will be liable if he negligently leaves some chattel, such as a bale of goods, delicately poised in such a position as

to be likely to fall and injure persons coming there on business, *White v. France*, (1877) 2 C. P. D. 308.

(e) See on this point the judgment of Bowen, L.J., in *Thomas v. Quartermain*, (1887) 18 Q. B. D., p. 696; and of Lord Herschel in *Membery v. Great Western R. Co.*, (1889) 14 App. Cas., p. 191. And see *post*, pp. 515-516.

something escaping from the position where he has placed it, and falling upon and injuring a person who is upon the premises on business at the owner's invitation, differs from the liability for a similar injury caused by a thing falling from off the land and injuring a person who is on the adjoining land or on a highway, in this respect, that whereas the latter liability is, as has been seen (a), independent of any question of negligence, the former is not.

Duty of
wharfinger.

In the case of a wharfinger occupying a wharf on the bank of a tidal river, and inviting shipowners to bring their vessels to lie alongside for the purpose of loading or discharging goods at the wharf, there exists a somewhat extended duty to take care that the lying berth is reasonably safe (b). For although the soil of such berth, being part of the bed of a tidal river, may not be in his occupation or under his control, still as the use of the berth is necessarily incidental to the use of his wharf, and as he is on the spot and consequently has better means of ascertaining whether the berth is safe than those in charge of the ship have, it is reasonable that an obligation should lie on him to ascertain its condition, and upon discovery of a defect either to remove it or give warning of its existence (c). Therefore in *White v. Phillips* (d), where the defendants, who occupied a wharf in the Thames, had deepened the bed of the river adjoining the wharf, and had constructed a campshed to prevent the soil from filling up the deepened part, which campshed was completely covered at high water, and the plaintiffs' barge while loading at the wharf, on the tide ebbing, fell on the campshed and canted over and was injured, it was held that the defendants having given no notice of the existence of the campshed were liable. And this duty on the part of the wharfinger to give warning of unsafety in the condition of the lying berth is not confined to cases in which that condition is due to artificial structures such as the campshed above mentioned, but extends to cases in which the unsafety is due to natural inequalities in the surface of the soil. Thus in *The Moorcock* (e), where the plaintiff's vessel, which

(a) See above, pp. 438 *sqq.*

52 W. R. 68.

(b) *Butler v. M'Alpine*, (1904) 2 Ir. R. 445, C. A.

(d) (1864) 33 L. J. C. P. 33.

(e) (1889) 14 P. D. 64.

(c) *The Ville de St. Nazaire*, (1903)

was of such draught that it could not lay alongside the defendants' jetty in the river Thames without grounding at low water, while discharging its cargo at the jetty settled on a ridge of hard ground underneath the mud and sustained damage, it was held that the defendants were answerable, for they were bound to ascertain the condition of the bottom and either level it or else give due warning. Whether in any case the duty of the wharfinger, where the soil of the river is not in his occupation, extends beyond the actual limits of the berth itself to the access of the berth, is doubtful. In *The Calliope* (a) Lord Watson was indeed of opinion that wharfingers are "bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction they must either remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay" (b). This, however, was apparently doubted by Lord Halsbury (c) on the ground of the impossibility of fixing any limit at which such an obligation is to cease. It may well be that wharfingers are bound to give warning of any source of danger connected with the approach to the berth of which they are aware, but why they are bound to ascertain the condition of the bottom beyond the actual limits of the soil they use it is difficult to say (d).

This obligation, however, to take care that the premises are reasonably safe does not exist towards all persons who are invited thereon by the owner, but only towards such as are so invited for his benefit, that is to say, upon business in which he has an interest. It does not exist towards bare licensees who come there for their own pleasure or convenience alone (e). Therefore a declaration which alleged that the defendants were possessed of certain waste land on which was a quarry, that all persons having occasion to pass over the waste had been accustomed to go across it by the permission of the owners, that the quarry was precipitous, and dangerous to persons so crossing, and that

(a) (1891) A. C. 11.

(b) (1891) A. C. p. 23.

(c) *Ibid.* p. 17.

(d) As to the limitations on liability,

see *Parker v. Plomesgate Rural Council*,
(1903) 9 Com. Cas. 107.

(e) *Giles v. London County Council*,

(1904) 68 J. P. 10.

the defendants knowing the premises negligently left the quarry unfenced, whereby the plaintiff, who had occasion to cross the waste on a dark night, and was unaware of the existence of the quarry, fell into it and was injured, was held bad on demurrer (a). It is, however, provided by section 13 of the Metalliferous Mines Regulation Act, 1872 (b), where a mine is abandoned or the working thereof is discontinued the owner thereof and every other person interested in the minerals of the mine shall cause the top of the shaft to be fenced. The term "owner," does not, however, include a person who is merely the owner of the soil and is not interested in the minerals of the mine (c).

One who for his own convenience goes upon land by the owner's permission "must take the permission with its concomitant conditions and it may be perils" (d); were he to complain that the premises were unsafe, his complaint would, as has been said, wear the colour of ingratitude. So, where the landlord of a house let out in apartments to different tenants gratuitously allowed the tenants to use the leads on the roof of the house (which leads were fenced round with an iron rail) for the purpose of drying their linen, and one of the tenants went on to the roof for that purpose, and having accidentally fallen against the rail, by reason of the rail being out of repair fell down into the courtyard below, the injured party was held not entitled to recover against the landlord, for the mere licence to use the roof imposed no duty upon the licensor to keep the fence in repair (e). It is submitted, however, that in this case the licence to use the roof is not easily separable from the tenancy of the rooms, to which the licence probably gave an enhanced value.

Who are
persons
coming on
business.

The rule, however, that the obligation to take care is owed only to persons coming on the premises for the benefit of the

(a) *Hounsell v. Smyth*, (1860) 7 C. B. N. S. 731; and see *Derlin v. Jeffray's Trustees*, (1903) 5 F. 130, Ct. of Sess.

(b) 35 & 36 Vict. c. 77.

(c) *Knuckey v. Redruth Rural District Council*, (1904) 1 K. B. 382.

(d) *Per Williams, J., Hounsell v. Smyth*, (1860) 7 C. B. N. S. p. 743. The danger there was not concealed; see below, p. 491.

(e) *Iray v. Hedges*, (1882) 9 Q. B. D. 80. The case of *Southcote v. Stanley*, (1856) 1 H. & N. 247, may well be supported on this ground, though not upon the ground put by Pollock, C.B., that a visitor at a house by accepting the invitation becomes a member of the *familia*, and as such brings himself within the rule of *Priestley v. Fowler*, (1837) 3 M. & W. 1. See above, p. 83.

licensor has received a very liberal interpretation in favour of the licensee. Thus, where a gasfitter, having contracted to fix certain gas apparatus to the defendant's premises, sent his workman, the plaintiff, after the apparatus had been fixed, and by appointment with the defendant, to see that it acted properly, and the plaintiff while upon the defendant's premises for this purpose fell through an unfenced shaft in the floor and was injured, he was held to come within the rule, and to be entitled to recover (a). It is not necessary that the licensor should have any special interest in the licensee being on the premises at the particular time when the accident happens; it is sufficient that he should derive benefit from, or have an interest in, the transaction as a whole, in the course of which the licensee suffers the injury (b). Thus where a ship entered a dock to load, and, the propeller having fouled a rope while she was crossing the dock, the dock-master permitted her gratuitously to go into a lock in order that the water might be drawn off and the propeller cleared, which lock was dangerous for a ship of her draught by reason of the existence of a sill of which the dock-master ought to have known, and the ship grounded on the sill and was damaged, the majority of the House of Lords held that the dock-owners were liable notwithstanding that they got no extra consideration for the use of the lock (c). Nor is it necessary that the owner should in fact derive benefit from the licensee's presence: it is enough that he has an interest in his being there, which includes the possibility of deriving benefit (d). "The common case is that of a customer in a shop; but it is obvious that this is only one of a class; for whether the customer is merely chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know. This protection does not depend upon the fact of a contract being entered into in the way of the

(a) *Indermaur v. Dames*, (1866-7) L. R. 2 C. P. 311.

(b) See *Holmes v. North Eastern R. Co.*, (1869-71) L. R. 6 Ex. 123.

(c) *The Apollo*, (1891) A. C. 499.

Lords Bramwell and Morris, however, dissenting, were of opinion that the shipowner was a bare licensee.

(d) *Wright v. Leferer*, (1903) 51

W. R. 149, C. A.

shopkeeper's business during the stay of the customers, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was "(a)". In one case, where a barge of the defendant was being unlawfully navigated on the river Thames by a single man (the rules of the Conservancy requiring that she should have had two on board), and the plaintiff, a waterman in want of employment, seeing this, went on to the defendant's wharf to complain to the defendant's foreman, and whilst there was injured by reason of the premises having been negligently permitted to be in an unsafe condition, it was held that the plaintiff was on the premises on business in which the defendant had an interest (b).

Just as, in cases in which chattels have been issued for use under a contract, the duty of the party so issuing them to take care that they shall not be dangerous to the persons using them is not confined to the immediate persons to whom they are issued, so too in the case of premises, upon which the owner invites other persons to come on business, the duty of the owner to take care that the premises are safe is not confined to the persons going there on business in which the owner is directly interested. Thus in *Smith v. London & St. Katharine Docks Co.* (c), where the defendants provided and retained under their control gangways from the shore to the ships lying in their docks, and the plaintiff, an optician, who had gone on board one of the ships in the docks, at the request of one of her officers, to show him some nautical instruments, whilst returning across the

(a) *Per* Willes, J., *Indermaur v. Dames*, (1866) L. R. 1 C. P. p. 287.

(b) *White v. France*, (1877) 2 C. P. D. 308.

(c) (1868) L. R. 3 C. P. 326. In this case there was a suggestion (though apparently no finding of the jury) that

the source of danger was a trap known to the defendants, but nothing turned on this. The Court evidently did not intend to limit their decision to that class of cases. For rule in case of a trap, see *Harris v. Perry*, (1903) 2 K. B. 219.

gangway which, owing to the negligence of the defendants, was insecure, fell and was injured, the defendants were held liable on the ground that he was a person "having business on board the ship," although not business in which the defendants were interested (a). And in *Heaven v. Pender*, Cotton and Bowen, L.JJ., went a step further and held that a dock-owner, who supplied and put up stages for immediate use to enable the outsides of ships to be painted while lying in the dock, was under a duty, towards all persons employed by the shipowners to paint their ships, to see that the stages were reasonably safe, although at the time of their use by the painters the stages were temporarily out of the dock-owners' control (b). On the same principle in *Miller v. Hancock* (c) it was held that the owner of a building let out in flats, served by a common staircase, which staircase he was under a contractual duty towards his tenants to repair, was liable to a third person, who came on behalf of a railway company to collect some money due from one of the tenants to the company, and owing to the defective condition of the stair fell and was injured. "The landlord," said Bowen, L.J., "has given the tenant a right to use the staircase, and undertaken to keep it in repair; and he knows that persons who have business with the tenant will be coming up and down the stairs, and those persons will use the stairs on the understanding that they may lawfully do so, and that in doing so they will be shielded by the responsibility of the person on whom the liability to repair the staircase may rest" (d).

But although as towards a bare licensee there is no duty on the licensor to exercise care to have the premises in a reasonably safe condition, yet he is bound to warn the licensee of any concealed source of danger, the existence of which is actually known to him, as where a bridge over which he permits others to pass

Duty towards bare licensee to warn of concealed danger known to licensor.

(a) And see *Madoc v. Ryde Pier Co. v. Times Newspaper*, Feb. 3rd, 1905, C. A.

(b) (1883) 11 Q. B. D. p. 515. They treated the use of the painting stage as so incidental to the use of the dock, that, although the stage was not actually under the dock-owner's control, it might practically be regarded as part of the

dock premises. From their point of view the duty of the dock-owner was evidently analogous to that of the wharfinger in respect of the bed of the river adjoining his wharf, which is mentioned above, p. 484.

(c) (1893) 2 Q. B. 177.

(d) *Ibid.* p. 181.

station on the L. & S. W. line, and consequently dangerous to alight from at that place. The plaintiff, who was travelling with the return half of a ticket issued to him by the L. & S. W. R. Co., while alighting from the carriage at Richmond, fell in consequence of the carriage being so unsuited to the platform and was injured. It was held by Bramwell and Baggallay, L.JJ., that even assuming that the ticket issued by the L. & S. W. R. Co. did not create any contract between the plaintiff and the defendants, the defendants were liable to him in tort on the ground that "the combined arrangements were a trap or snare" (a).

Who are bare licensees.

As towards trespassers indeed there is no implied representation of safety at all, and therefore no duty to warn of any concealed source of danger, but it is sometimes a matter of difficulty to determine whether a person is a trespasser or a licensee. It seems clear the invitation or licence to come on the premises need not be express (b); a licence will in many cases be implied. The existence of a private road leading to a house, being the usual mode of access to it, probably operates as an implied licence to any person living in the neighbourhood who might in the ordinary course be expected to call upon the owner to use it for that purpose. But it cannot be regarded as a licence to a passer-by to enter for the purpose of asking the way, nor to a hawker to come there for the purpose of hawking his goods (c), nor to a beggar to come there for alms. Such persons must be regarded as trespassers.

Negligent communication of infectious disease.

Whether a person who, knowing himself to be suffering from an infectious disease such as small-pox or scarlet fever, negligently communicates such disease to another is in all cases liable to an action for damages is a question which cannot as yet be regarded as definitely decided. But it is apprehended that he is so liable (d). There seems to be a legal duty not to do any

(a) As to whether the existence of an infectious disease upon premises is a concealed danger of which the licensor is bound to give warning, see below, p. 495.

(b) *White v. France*, (1877) 2 C. P. D. 308.

(c) See *per* Bovill, C.J., *Smith v. London & St. Katherine Docks Co.*,

(1868) L. R. 3 C. P. p. 332.

(d) By s. 68 of the Public Health (London) Act, 1891, any person who when suffering from any dangerous infectious disease wilfully exposes himself, without proper precaution against spreading the disease, in any public place, is liable to a fine not exceeding 5*l.*

unnecessary act which would have the effect of directly communicating such disease. Indeed it seems difficult to distinguish upon principle the act of negligently communicating an infectious disease from that of negligently causing a person to absorb a poison of any other kind. In *Davies v. England* (a) a count was held good which alleged that a master who, knowing certain carcasses of slaughtered cattle to be diseased and infectious, employed the plaintiff who was ignorant of their infectious condition to cut them up, whereby he was infected. In that case there was no doubt a contractual relationship between the parties, but it is conceived that the existence of that relation is not essential to the creation of the duty. In *Hegarty v. Shine* (b) a woman sued her paramour for communicating to her a venereal disease. It was held that the action would not lie on the ground that the case fell within the maxim *ex turpi causâ non oritur actio*. As that is apparently the only case in which that maxim has ever been expressly applied to an action of tort, the Court would presumably have avoided so novel an application of it if they could have done so by deciding the case on other grounds. It is to be inferred from the grounds upon which they proceeded that they would have held the negligent communication of any infectious disease, not involving an act of immorality, to be actionable. Lord Hale indeed in his Pleas of the Crown said that if a person suffering from an infectious disease "goes abroad to the intent to infect another, and another is thereby infected and dies, whether this be murder or not by the common law might be a question," and he apparently rested his doubt upon the ground that "it is hard to discern whether the infection arise from the party, or from the contagion of the air" (c). Having regard to the state of medical knowledge in his day, that doubt may well have been justified; and for the same reasons it may be doubted whether, in the event of the disease so communicated not proving fatal, a civil action for damages would have lain at that day. But now that the periods of incubation of the various infectious diseases are sufficiently determined to allow of the precise date of the contraction of the disease being

(a) (1864) 33 L. J. Q. B. 321.

(c) Vol. 1, p. 432.

(b) (1878) 14 Cox, C. C. 124, 145.

fixed with reasonable certainty, the ground of Lord Hale's doubt is to a great extent removed. It is submitted that at the present day if a person wilfully infects another with intent to kill, and the other dies, such act of infection is murder; that if the act be done negligently and without intent, and the infected person dies, it is manslaughter; and that if, whether the act be done intentionally or negligently, the infected person recovers, an action on the case lies for the injury so caused. If an owner of a house knowing it to be infected invites another to come there, the fact of the infection is a concealed danger or trap which, it is presumed, he is as much bound to disclose as he is to disclose the existence of an unfenced hole in the floor. So if a surgeon in performing an operation uses a knife which he knows to be infected, or if a person who knows himself to be suffering from an infectious disease shakes a friend by the hand, if damage ensue an action ought to lie. In *R. v. Vantadillo* (a) it was held to be an indictable nuisance to take a person who was suffering from small-pox through a public street, from which it follows that a person who suffers special damage from such an act would have a right of action (b). It need not, however, be inferred that the right of action is confined to cases in which the act causing the communication of the disease amounts to an act of nuisance. In the latter case of *Reg. v. Clarence* (c), Stephen, J., indeed suggests that it is only in such cases that the act is indictable (d). But he was there dealing with cases of communication of disease not resulting in death, which, unless they amount to nuisance, cannot be brought within any of the well-defined categories of crime, for the act of communication does not amount to an assault; he did not apparently intend to negative the proposition that such act of communication, if it resulted in death, would be indictable as manslaughter, or if it caused damage other than death, would be actionable, even though committed towards a single individual in a private house. But even if the above view be correct, that a person who knowing himself to be suffering from infectious disease negligently

Communica-
tion of disease
must be result
of a positive
act done.

(a) (1815) 4 M. & S. 73.

(b) And see 38 & 39 Vict. c. 55, s. 126;
54 & 55 Vict. c. 76, s. 68.

(c) (1888) 22 Q. B. D. 23.

(d) *Ibid.*, p. 40.

communicates it to others is civilly liable for the consequences irrespective of the place where the communication occurred, it seems he is only so liable if the communication was the result of a positive act done by him. Mere passive non-disclosure will not suffice. In *Sarson v. Roberts* (a) the defendant let to the plaintiff furnished lodgings which were free from infection at the time of the letting, but while the plaintiff was in occupation of them the defendant's grandchild became ill with scarlet fever. The defendant concealed the fact of the illness from the plaintiff, with the result that the plaintiff's wife and child took the fever. It was held that there was no duty on the defendant to disclose the fact of his grandchild's illness, and that an action to recover the expenses of medical attendance and nursing would not lie. Mere proximity, where no positive act is done, will not give rise to such a duty. But it is conceived that if the premises had been infected at the time of the plaintiff's entry on occupation the defendant would have been liable (independently of any doctrine of implied warranty that they were fit for habitation), upon the ground that the act of inviting the plaintiff on to the premises was a positive act done by the defendant, and that in such case the action would equally have lain whether the plaintiff was a tenant or a bare licensee.

Where a person sells animals which he knows to be suffering from infectious disease, and which he knows the purchaser may put with other animals of his own to their injury, such sale will be a positive act within the above suggested rule, and there will presumably be a duty to disclose the fact of the infection, the maxim of *caveat emptor* notwithstanding. But as the motive of a vendor who in such a case conceals the disease is always to defraud, it has been thought more appropriate to deal with the subject of his liability for such concealment in the chapter on Fraud (b).

Selling
diseased
animals.

In one case (c) the judgment of the Exchequer Chamber seems to have left it as an open question whether there is not a duty

Party pulling
down his
house under
no duty to
take care as
towards
owner of
modern house
adjoining.

(a) (1895) 2 Q. B. 395, C. A.

513; and *Friend v. Mapp*, (1904) 68 J. P. 589.

(b) As to which see below, pp. 528 *sqq.*
For recent cases on the law relating to the sale of unsound meat, see *Wieland v. Butler-Hogan*, (1904) 73 L. J. K. B.

(c) *Chadwick v. Trower*, (1839) 6 Bing. N. C. 1.

imposed upon a person engaged in pulling down his house to take care not to injure his neighbour's modern house adjoining by withdrawing the support which it has enjoyed. It was there decided that the defendant, who had pulled down his house together with the vault under it, and by reason of his neglect to shore or use other precautions had let down the modern adjoining vault of the plaintiff, was not liable if he had not known of the existence of the vault, a decision which seems to suggest that he would have been liable if he had known of its existence. Such a suggestion, however, is altogether opposed to principle and authority (a). Not only is the defendant under no obligation to take care in such a case, but he may lawfully cause the damage intentionally, with the very object of preventing the acquisition of a right of support, though presumably the case would be reversed if the party aggrieved had, by prescription, acquired such a right.

Onus of proof of negligence.

The *onus* of proof of negligence lies in general on the party charging it; but under certain special circumstances the mere happening of an accident will afford *primâ facie* evidence that it was the result of want of due care; *res ipsa loquitur*. "Where something happens which would not happen, if ordinary care and skill were used, the happening of that is evidence on which a jury may find that there has been negligence on the part of the defendants" (b). Thus the mere occurrence of a railway collision is, in general, enough to throw the *onus* on the company of showing that it was not the result of want of care (c). So where a vessel at anchor is run down by another vessel the vessel under weigh is bound to show that the accident did not arise from any negligence on her part (d). So where a barrel of flour fell out of an upper window of the defendant's shop upon the plaintiff passing in the street below, it was held that the occurrence was sufficient *primâ facie* evidence of negligence to cast the *onus* of proof on the defendant that the accident was not caused by his negligence (e). So where a bag of sugar fell from a crane fixed

(a) See *Dalton v. Angus*, (1881) 6 App. Cas. 740.

(b) *Per* Brett, J., *Gee v. Metropolitan R. Co.*, (1873) L. R. 8 Q. B. p. 175.

(c) *Curpue v. London, Brighton, &*

South Coast R. Co., (1844) 5 Q. B. 747.

(d) See *per* Dr. Lushington, *The Batavier*, (1845) 2 W. Rob. p. 407.

(e) *Bryan v. Boadle*, (1863) 2 H. & C. 722.

over a doorway under which the plaintiff was lawfully passing, in the absence of any explanation of the cause of the bag falling the defendants were held liable (a). Again, where a bolting horse runs down a person in broad daylight, there is *primâ facie* a presumption of negligence (b). And similarly where a packing-case, which was propped up against a wall, fell upon and injured the plaintiff, it was held that the maxim *res ipsa loquitur* applied, for that "packing-cases do not usually fall of themselves unless there has been some negligence in setting them up" (c). Where, however, a pupil-teacher at a school was engaged in teaching a class and was for that purpose using a black-board on an easel, and owing to the pegs of the easel not fitting well, the board fell down and injured one of the scholars, it was held that the maxim did not apply, and that the fall of the board was no evidence of negligence in any one (d). It is somewhat difficult to reconcile this case with those previously cited, for boards do not usually fall of themselves any more than packing-cases, and the Court did not apparently suggest any distinction, but contented themselves with saying that each case must depend on its own facts.

Where goods are delivered to a carrier upon the terms that the carrier is only to be liable for negligence, if the goods are inanimate, as for example furniture, the fact of damage occurring in the course of transit is probably of itself evidence of negligence (e), but where they consist of live animals, and the injuries are such as are equally consistent with restiveness on the part of the animals as with negligence on the part of the carriers, it is no evidence of negligence (f). For the maxim *res ipsa loquitur* only applies where what happens fits better with the hypothesis of the existence of negligence than with that of its absence (g).

Onus of proof in case of carriers.

(a) *Scott v. London Dock Co.*, (1865) 3 H. & C. 596; see also *Kearney v. London, Brighton, &c., R. Co.*, (1871) L. R. 6 Q. B. 759. See too *per* Lord Halsbury, *Smith v. Baker*, (1891) A. C. p. 335.

(b) *Snee v. Durkie*, (1903) 6 F. 42, Ct. of Sess.

(c) *Briggs v. Oliver*, (1866) 4 H. & C. 403.

(d) *Crisp v. Thomas*, (1890) 63 L. T.

N. S. 756.

(e) *Jolley v. Great Eastern R. Co.*, cited (1888) 57 L. T. N. S. p. 814; see also *Price & Co. v. The Union Lighterage Co.*, (1904) 1 K. B. 412.

(f) *Smith v. Midland R. Co.*, (1888) 57 L. T. N. S. 813; and see Wyatt Paine on Bailments tit. Carriers, p. 265, *sqq.*

(g) *Cotton v. Wood*, (1860) 8 C. B. N. S. 568.

Plaintiff must show that defendant's negligence was the cause of the damage.

To entitle a plaintiff to recover in an action for negligence he must not merely establish the facts of the defendant's negligence and of his own damage, but he must show that the one was the effect of the other; there must, to use an expression of Lord Cairns (a), be proof of "*incuria dans locum injuriæ*." Thus, where the defendants, a railway company, negligently allowed an excessive number of passengers at one station to enter a carriage in which the plaintiff was seated, and at the next station the plaintiff in endeavouring to prevent still more persons from entering the carriage stood up and placed his hand on the edge of the carriage door, and a porter pushed away the persons who were trying to enter and slammed to the door, whereby the plaintiff's thumb was caught and crushed, it was held there was no evidence of such negligence in the defendants as could be said to have occasioned the mischief, and that the plaintiff ought to have been nonsuited, for it was not contended that the porter who shut the door was guilty of any negligence in so doing, and there was no causal connection between the negligence of the company's servants in allowing too many passengers to enter the carriage and the occurrence of the accident (b). So, too, if those in charge of a train are guilty of negligence in omitting to whistle at the approach of the train to a level crossing, and a passenger, who is stone-deaf or so drunk that he could not have heard the whistle had it been sounded, is run over while attempting to cross the line, though there is negligence on the part of those in charge of the train it is not negligence *per quod* the damage happened (c); and the same might be said if the passenger, notwithstanding the driver's neglect to whistle, saw the train approaching and yet persisted in attempting to cross the line in front of it.

Again where the proximate cause of the accident is the

(a) *Metropolitan R. Co. v. Jackson*, (1877) 3 App. Cas. p. 198.

(b) *Ibid.*

(c) *Per Lord Cairns, Dublin, Wicklow, &c., R. Co. v. Slattery*, (1878) 3 App. Cas. p. 1166; *The Englishman*, (1877) 3 P. D. 18. A deaf man presumably crosses a level crossing of a railway at his peril, for under ordinary circumstances if those in charge of the

train give due warning of its approach by whistling, they have discharged their duty, for it is the foot-passenger and not the train that has to get out of the way. But it is otherwise with a deaf man crossing a street. The duty of drivers of vehicles is not confined to merely shouting out warning. See *Smith v. Broune*, (1891) 28 L. R. Ir. 1.

intoxication of the person injured there is no liability (a). But on the other hand it is negligence, sounding in damages against a railway company, if the company's servants admit a drunken person upon the platform, should he when in that condition inflict injury on another passenger (b).

Where, an accident having happened, there is no direct evidence as to its cause, the mere fact that there is evidence of negligence on the part of the defendant which might have caused it, is not necessarily enough to justify the case being left to the jury. Thus where the dead body of a man was found on a railway line near a level crossing at night, the man having been killed by a train which carried head-lights, but did not whistle or otherwise give warning of its approach, but there was no evidence to show how the deceased got on to the line, it was held by the House of Lords that, even assuming that there was evidence of negligence on the part of the railway company (which they did not decide), there was no evidence to connect that negligence with the accident (c).

In the subsequent case of *Fenna v. Clare* (d), the defendants maintained, at a spot immediately adjoining a highway, a low wall eighteen inches high, with sharp spikes on the top, which wall was a nuisance to the highway. The plaintiff, a child of between five and six years of age, was found standing by the side of the wall with her arm bleeding from a wound, such as might have been caused by her falling on the spikes while lawfully passing along the highway. At the trial the child was not called as a witness, and no evidence was given as to how the accident happened, except that of a witness who said that shortly before the accident he saw the plaintiff climbing up on the wall, and told her to get down, which she did. It was held that there was evidence to go to the jury that the nuisance was the cause of the accident. But it seems difficult to reconcile that decision with

(a) *McCormick v. Caledonian R. Co.*, (1904) 6 F. 362, Ct. of Sess.

(b) *Adderley v. Gt. Northern R. Co.*, (1905) 2 Ir. R. 378, C. A.

(c) *Wakelin v. London & South Western R. Co.*, (1886) 12 App. Cas. 41. There was nothing in the facts of that case to show that the deceased had not

brought about his death by his own negligence, for, as Lord Halsbury pointed out, there is no "legal presumption that people are careful and look before them on crossing a railway." But cp. *Smith v. South Eastern R. Co.*, (1896) 1 Q. B. 178.

(d) (1895) 1 Q. B. 199.

the principle of *Wakelin v. London & South Western R. Co.*, unless indeed it can be said that, though there is no legal presumption that a person will not be negligent, there may be such a presumption that a person will not commit a wilful trespass. The Court, however, did not profess to proceed upon any such distinction.

Another decision not easily explicable on logical grounds is *Bell v. Caledonian R. Co.* (a), where a horse belonging to the plaintiff suffered permanent damage by one of its feet being caught in an interstice, in the rails at a level crossing, caused by a wooden wedge not having been driven home.

In this case it was held by the Court of Session that, as the condition of the rails was inspected twice a day by competent servants of the railway company, the fact of such inspection absolved them from liability, although it was admitted in evidence that the passage of a train over the metals at this point was calculated to loosen the wedge, and it was proved that two trains had passed since the last inspection.

Contributory
negligence of
third party.

To establish the defendant's liability his negligence need not necessarily have been the immediate cause of the injury; provided it be a substantial part of the cause, he will be none the less liable because the injury may have been contributed to by the intervening negligence of a third person (b).

Contributory
negligence of
plaintiff.

But although a defendant whose negligence has been part of the cause of the plaintiff's injury is not relieved from responsibility by reason of the injury having been contributed to by the negligence of a third person, it is otherwise where it has been contributed to by the negligence of the plaintiff himself (c). Contributory negligence on the part of the plaintiff in many cases affords a good defence. It is in cases of collisions that this question of contributory negligence most frequently arises. "Those who go personally or bring property where they know that it may come in collision with the persons or property of others, have by law a

(a) (1902) 4 F. 431.

(b) *Abbott v. Mucfie*, (1863) 2 H. & C. 744; *Clark v. Chambers*, (1878) 3 Q. B. D. 327; *Sullivan v. Creed* (1904) 2 Ir. R. 317.

(c) The principle of "*volenti non fit*

injuria" applies where the injury to the plaintiff was caused by an obvious and easily avoidable danger (*Giles v. London County Council*, (1904) 68 J. P. 10).

duty cast upon them to use reasonable care and skill to avoid such a collision. And the duty in such cases is reciprocal. With two carriages or two ships of equal weight, the risk of damage, if they come into collision with each other, is about equal, and the reciprocity of duty is obvious (a). Where a light gig comes in collision with a heavy wagon, the damage is likely to fall principally on the light gig, and if a man comes negligently in collision with an express train, he will almost certainly be dashed to pieces, whilst those in the express train will very likely be unconscious that any accident has happened. There is a natural feeling in juries in favour of the light gig or the man, who will suffer the chief damage; but the duty cast by law on the light gig or man is the same as that cast on the heavy vehicle, viz. : to use reasonable care and skill to avoid the collision " (b).

The rule, however, that the contributory negligence of the plaintiff will in general afford a defence, is subject to the very important qualification, that " if *the defendant* could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him " (c); which qualification has also been stated in a somewhat different form, that " although there may have been negligence on the part of the plaintiff, yet unless *he* might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover " (d). The former statement is applicable to a case in which the defendant is on the spot at the time of the accident and the plaintiff is not: the latter is applicable to a case in which the plaintiff is on the spot at the time of the accident and the defendant is not; both statements are applicable to a case in which both parties are on the spot; but neither statement seems to suggest whether the qualification applies to a case in which neither party is on the spot at the time of the accident, as for instance where a horse and cart which has been carelessly left unattended in the street starts off by itself and

Rule in
Davies v.
Mann.

(a) For cases on this point see *ante*, pp. 459 *sqq.*

(b) *Per* Lord Blackburn, *Dublin, Wicklow, &c., R. Co. v. Slattery*, (1878) 3 App. Cas. p. 1206.

(c) *Per* Lord Penzance, *Radley v. London & North Western R. Co.*, (1876)

1 App. Cas. p. 759; see also the direction of Erskine, J., *Davies v. Mann*, (1842) 10 M. & W. p. 547.

(d) *Per* Parke, B., *Bridge v. Grand Junction R. Co.*, (1838) 3 M. & W. p. 248; and *per* Parke, B., *Davies v. Mann*, (1842) 10 M. & W. p. 548.

runs into another horse and cart standing in the middle of the street also unattended. The above statements, moreover, are open to the objection that they seem to imply that, in the cases to which the qualification applies, there are a succession of negligences in point of time, and that the party last negligent is the party really responsible; but it may be observed that if a man places his person or property in a position of danger, or establishes a state of things which is or may be dangerous to others, his negligence in so creating a source of danger to himself or others continues as long as that source of danger remains unremedied, that is to say, continues down to the very moment of the accident.

Again, the above statements of the qualification do not make it clear whether the responsibility of the party who is on the spot at the time of the accident is dependent or not upon his having actually become aware of the fact of the other party's negligence before committing the negligence which is charged against himself.

Cases where
defendant
aware of
negligence of
plaintiff.

In *Davis v. Mann* (a) the plaintiff carelessly left his donkey fettered on a highway, and the defendant's wagon coming along at an improper pace injured the donkey, which could not get out of the way. The judge directed the jury that if the accident might, notwithstanding the negligence of the plaintiff, have been avoided by the exercise of ordinary care on the part of the driver of the wagon, the defendant was responsible, and the jury having found for the plaintiff, that direction was upheld by the Court. "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage on the wrong side of the road" (b). It does not appear clear from the facts of this case whether the driver saw the donkey at all before the accident happened, or if he did whether he saw it in sufficient time to allow of his pulling up his horses and avoiding it, but the above extract from the judgment seems to suggest that he did. In *Tuff v. Warman* (c), the plaintiff's

(a) (1842) 10 M. & W. 546.

(b) *Per Parke, B., ibid.* p. 549.

(c) (1858) 5 C. B. N. S. 573.

barge while being navigated down the river under sail by two men, neither of whom kept any look-out, was run into by the defendant's steamer coming up the river; the steamer had a look-out, but persisted in keeping her course until too late to avoid the collision. The defendant was held liable. Here, indeed, both parties were in motion at the moment of the accident, and the barge in one sense ran into the steamer, and therefore, if the steamer had had no look-out at all the defendant would, at common law, not have been liable; but the ground of the decision seems to have been that in view of the defendant's knowledge of the plaintiff's negligence the defendant was under the greater obligation to take care. These two cases seem to decide that not only does the mere fact of a plaintiff having been guilty of negligence in placing his person or property in a position of danger not make him "*caput lupinum*," so as to entitle others who are aware of the condition of things, wilfully to run into him with impunity, but that further, the defendant's knowledge of the plaintiff's negligence and of the consequent great risk of collision, coupled with his perception of the fact that the plaintiff is either absent from the spot, or being present, is not aware of the impending danger, or being both present and aware of it, has not the time or means to undo the effect of his previous negligence, imposes upon the defendant a greater obligation to take care than that which rests upon the plaintiff who has not the same knowledge or opportunities of avoiding the accident, and that the non-discharge of that obligation will make him the more culpable of the two; but they do not touch the question as to responsibility where the party on the spot has no knowledge of the other's negligence (a).

The case of *Butterfield v. Forrester* (b), however, is an authority that where the plaintiff is the only party on the spot actual knowledge of the other's negligence is unnecessary, and that if the plaintiff's absence of knowledge is due to his own negligence that is enough to disentitle him. In that case the plaintiff whilst riding at an excessive speed in the street of a town rode against

Cases where plaintiff ignorant of negligence of defendant.

(a) For a recent decision in which both parties were in motion and in which the defence of contributory negligence was successfully pleaded,

see *Reynolds v. Tilling, Ltd.*, (1903) 20 T. L. R. 57, C. A.

(b) (1809) 11 East, 60.

a pole which the defendant had improperly put across the street and damaged himself, and it being proved that he might well have seen the pole and avoided it but for the excessive speed at which he was riding, it was held that he could not recover. There the plaintiff was the only party in motion at the time of the accident, but whether the same principle will apply where, the plaintiff being the only party on the spot, the defendant's property alone is in motion, as where a person standing in the middle of a road is run over by a driverless cart which he might have seen if he had kept his eyes open, there is no authority to show.

Cases where
defendant
ignorant of
negligence of
plaintiff.

It is further to be inferred from the decision of the House of Lords in *Radley v. London & North Western R. Co.* (a), that where the only party on the spot at the time of the accident was the defendant and he alone was in motion, in order to render him responsible it is not necessary that he should have had actual knowledge of the other's negligence, and that if it is only by reason of the defendant's own negligence that he had not that knowledge his ignorance will not excuse him. There the plaintiffs were possessed of a siding, connected with the defendants' railway, and of a bridge over the siding. Upon the siding was a truck of the plaintiffs, with a second truck loaded on the top of it, the joint heights of the two trucks being too great to allow of their passing under the bridge. The plaintiffs knew that the defendants would shortly be likely to deliver some more trucks on to their siding, the result of which might be to drive the loaded truck against the bridge and damage it, yet knowing this they omitted to unload the truck and therein were guilty of negligence. The defendants subsequently brought some more trucks of the plaintiffs on to the siding and pushed the loaded truck against the bridge. The engine-driver, feeling a resistance, instead of going to see what the cause was, forced the train forward and broke the bridge down. The judge at trial having omitted to direct the jury that if the driver could in the result by the exercise of ordinary care have avoided the accident the plaintiffs' negligence would not excuse the defendants, the House of Lords ordered a new trial, being of opinion that upon the facts stated there was evidence upon which the jury could so

(a) (1876) 1 App. Cas. 754.

find, notwithstanding that the driver had no actual knowledge of the state of affairs. But if actual knowledge of the fact of the plaintiff's negligence is not an essential ingredient of the defendant's liability, then in such cases as *Radley v. London & North Western R. Co.* the only distinction that can be drawn between the two parties, as regards their respective shares in the cause of the injury, is that one was in motion and the other was not. The ground of the defendant's liability in such a case is not that he was any more negligent than the plaintiff, for both were guilty of a want of ordinary care, and there was nothing in the facts to impose a greater obligation to exercise that care upon one party than upon the other; nor is it that the defendant's negligence was later in time than that of the plaintiff, for the negligence of the plaintiff in omitting to remove his person or property from its position of danger continued down to the moment of the accident just as much as did the defendant's omission to take care; it is simply that the latter being in motion was the one who actually did the damage. He is responsible who was the efficient cause. The principle so established leads to curious results; for instance if a driver of a cart being drunk or asleep suffers his cart to drive over a donkey lying in the road he will be liable; but, as it cannot make any difference, as regards the means of knowledge of the donkey being there, whether he be fast asleep in the cart or absent from the scene altogether, if he leaves his horse and cart unattended in the street and it starts off by itself and causes a similar accident, he ought equally to be liable. But whether the Court would go the length of so holding may well be doubted. Although in a recent case it has been held *primâ facie* evidence of negligence in its owner, for an unattended horse to bolt and cause damage in a public place during the day time (a).

Where the respective negligences are equal the party who was the efficient cause is responsible.

But a plaintiff whose injury has been partly caused by the negligence of the defendant will not be disentitled to recover by reason of the injury having been contributed to by his own act, unless such act also was negligent. Although under ordinary circumstances a plaintiff who places his person or property in a position of some degree of danger, or does any other act from which consequences injurious to him are not unlikely to flow, is

To disentitle plaintiff to recover his contributory act must be negligent.

(a) *Snee v. Durkie*, (1904) 6 F. 42, Ct. of Sess.

Trespass of
child of
tender years.

Where, however, the child is guilty, not of mere carelessness in the doing of a lawful act, but of a wholly unlawful act such as a wilful and intentional trespass, such conduct will in all cases afford a defence irrespective of the age of the child. Thus in *Hughes v. Macfie* (a), where the defendant had raised his cellar-flap and reared it upright against the wall of his house and negligently left it in that position, and the plaintiff, aged seven wrongfully climbed upon the flap, and, in jumping off, brought the flap down upon itself, it was held that the plaintiff could not recover. So, too, in *Mangan v. Atterton* (b), where the defendant exposed in a public place a machine for crushing oilcake, unfenced, without being thrown out of gear, and without any person to watch it, and the plaintiff, aged four, returning from school in company with some other boys, at the suggestion of one of them put his fingers within the machine, whilst another turned the handle, and in so doing crushed the plaintiff's fingers, it was held that the plaintiff could not maintain an action. "The defendant," said Bramwell, B., "is no more liable than if he had exposed goods coloured with a poisonous paint, and the child had sucked them." It is submitted, however, that if a tradesman were to paint toys with poisonous colour, and a child of tender years were to suck the paint on them, and sustain injury thereby the maker would be responsible. But a child who climbs up behind a carriage, and tumbles off upon the carriage being set in motion, cannot be heard to complain. The case of *Lynch v. Nurdin* (c), indeed, suggests the contrary. There, the defendant having left his horse and cart unattended in the street, the plaintiff, aged seven, climbed on to the back of the cart, and another boy made the horse move on, which caused the plaintiff to fall and be injured; the plaintiff was allowed to maintain his action. Although the authority of that case has been doubted (d), the more recent decisions in *Jewson v. Gatti*, (e) and *Harrold v. Watney* (f) seem to reaffirm the principle laid down therein to

(a) (1863) 2 H. & C. 744; and see *Derlin v. Jeffray's Trustees*, (1903) 5 F. 130, though in this case reparation might have been obtained from the lessee.

(b) (1866) L. R. 1 Ex. 239.

(c) (1841) 1 Q. B. 29.

(d) *Per* Alderson, B., *Lygo v. Newbold*, (1854) 9 Exch. p. 305.

(e) (1886) 2 T. L. R. 381, 441.

(f) (1898) 2 Q. B. 320, C. A.

this extent, viz., that when the *mediate* cause of the accident is an act of negligence in the nature of a nuisance, the mere fact that the *immediate* cause is such an undue user of the defective article, or insufficiently guarded place, as to amount to an act of contributory negligence, will not necessarily disentitle the aggrieved party to recover for the damage he has sustained by reason of such initial non- or misfeasance on the part of the defendant.

This distinction between negligence and trespass may occasionally run somewhat fine. For instance, if the plaintiff in *Lay v. Midland R. Co.* (a) had, as suggested by Bramwell, B. (b), when the case was before the Court on a former occasion, intentionally crept through the lattice to a point where he had no right to be and then tumbled down, he probably could not have maintained his action.

Contributory negligence to afford a defence must be that of the plaintiff himself or of his servants, whom he has selected from his knowledge or belief in their care or skill: the contributory negligence of a third person, not being the servant of the plaintiff, will not suffice. Thus, where a collision occurred between two vessels by the fault of both, the representatives of a passenger on board one of the vessels, who was drowned in consequence, were held entitled to recover against the owners of the other, the persons in charge of the carrying vessel not being the servants of the deceased passenger (c). So, too, the negligence of a pilot whom the ship-owner is compelled to take is not imputable to the ship-owner (d); therefore, where a collision occurs between two vessels by the fault of both, and both are damaged, the one being under the charge of a compulsory pilot and the other not, the former may recover half her damage without any deduction in respect of the damage suffered by the other ship (e).

Contributory negligence to afford defence must be that of plaintiff or his servants.

It was formerly thought that in the case of the carriage of persons in trains or stage-carriages the passenger, by selecting the particular conveyance, was so far identified with the person in charge of it as to render him responsible for any contributory

Doctrine of identification of passenger in vehicle with party in charge of it exploded.

(a) (1874-5) See above, p. 507.

(b) (1874) 30 L. T. N. S. p. 530.

(c) *The Bernina*, (1887-8) 12 P. D.

(d) *Spaight v. Tedcastle*, (1881) 6

App. Cas. 217.

(e) *The Hector*, (1883) 8 P. D. 218.

58 : 13 App. Cas. 1.

Child of tender years identified with person in charge of him.

On issue of contributory negligence burden of proof lies on defendant.

Issue of contributory negligence distinct from that of the "per quod."

negligence on the part of such person, so that in the event of a collision with the train or stage-carriage of another company contributed to by the negligence of the person in charge of the plaintiff's conveyance, the plaintiff was precluded from recovering against the other company in respect of any injuries he might have sustained from such collision (a), but that doctrine has now been finally overruled (b). But a child of tender years, who is unable to look after himself, is to be treated as identified with the person in whose charge he is, so as to disentitle him to recover for an accident contributed to by the negligence of such person (c), and this principle will, apparently, absolve the defendant, not merely where he is charged with a breach of a contractual duty to take care, but also where he is an independent wrongdoer (d).

Upon the issue of contributory negligence the burden of proof at the commencement of the trial is upon the defendant (e), and the plaintiff is not bound in the first instance to give any evidence to negative the existence of it (f).

In considering the question whether the issue of contributory negligence is one which, when tried before a jury, it is under any circumstances competent for the judge to decide in the defendant's favour without the intervention of the jury; and upon which so deciding he may nonsuit the plaintiff; it must be borne in mind that the issue of contributory negligence and that of the "per quod" are wholly distinct and independent, the former being "an issue which does not arise until the defendant's negligence and its relation to the accident have been first established, and which in the absence of that conclusion is

(a) *Thorogood v. Bryan* (1849) 8 C. B. 115; *Armstrong v. Lancashire & Yorkshire R. Co.*, (1875) L. R. 10 Ex. 47.

(b) *Mills v. Armstrong; The Bernina*. (1888) 13 App. Cas. 1.

(c) *Per Williams, J.*, (1859) *Waite v. North Eastern R. Co.*, E. B. & E. p. 734.

(d) *Per Lord Esher, M.R.*, *The Bernina*, (1887) 12 P. D. p. 73.

(e) *Dublin, Wicklow, &c., R. Co. v. Slattery*, (1878) 3 App. Cas., *per Lord Hatherley*, p. 1169, and *per Lord Pen-*

zance, p. 1176; *Wakelin v. London & South Western R. Co.*, (1886) 12 App. Cas., *per Lord Watson*, p. 47.

(f) Lord Esher has indeed uniformly held the contrary (see *Gee v. Metropolitan R. Co.*, (1873) L. R. 8 Q. B. p. 174; *Bridges v. North London R. Co.*, (1873-4) L. R. 7 H. L. p. 232; *Darey v. London & South Western R. Co.*, (1883) 12 Q. B. D. p. 71; *Wakelin v. London & South Western R. Co.* (1886) 12 App. Cas. p. 43, but he seems to be the only judge in this country who has supported that doctrine.

immaterial to the case" (a). Where it is established that the damage has been brought about by the joint negligence of both parties, the plaintiff fails because, both parties having been in the wrong, *in pari delicto potior est conditio defendentis* (b). It is no doubt difficult to reconcile this view with the old practice of pleading, according to which contributory negligence was pleaded under the general issue. But it is submitted that the practice was in this respect inaccurate. The doctrine that the plaintiff's negligence destroys the causal connection between the defendant's negligence and the injury leaves no room for any meaning to be given to the word "contributory," and is open to question (c). If, indeed, that doctrine were right, it would follow that upon an indictment for manslaughter by the negligence of the prisoner, the contributory negligence of the deceased would afford a good defence, but the weight of authority is in favour of the view that it would not (d).

Where, indeed, the plaintiff admits some fact which necessarily goes to negative the "*per quod*," as for instance where a person, who has been knocked down upon the level crossing of a railway by a train which neglected to whistle, admits that he is stone deaf, and therefore could not have heard the whistle even if it had been sounded, or admits that notwithstanding the omission to whistle he saw the train coming before he stepped upon the line, the judge may undoubtedly nonsuit, but in such cases the negligent character of the plaintiff's conduct does not come in question. Whether it be negligent or not it is not the cause of the damage in respect of which the action is brought.

On the issue of the "*per quod*" judge may nonsuit.

Whether, however, upon the issue of *contributory negligence* the judge is ever at liberty to nonsuit is a question upon which there has been much difference of opinion.

Whether on issue of contributory negligence judge can ever nonsuit.

On the one hand it has been said that the issue of contributory

(a) *Per* Lord Penzance, *Dublin, Wicklow, &c., R. Co. v. Slattery*, (1878) 3 App. Cas. p. 1178.

(b) "In equal fault the position of defendant is the stronger." *Per* Lord Halsbury, *Wakelin v. London & South Western R. Co.*, (1886) 12 App. Cas. p. 45.

(c) For statutory provisions see 41 &

42 Vict. c. 16, s. 82, and *Blenkinsop v. Ogden*, (1898) 1 Q. B. 783.

(d) *Per* Pollock, C.B., *Reg. v. Swindall*, (1846) 2 C. & K. 230; *per* Lush, J., *Reg. v. Jones*, (1870) 11 Cox. 544; *per* Byles, J., *Reg. v. Kew*, (1872) 12 Cox, 355; but see *per* Willes, J., *contra*, *Reg. v. Birchall*, (1866) 4 F. & F. 1087.

negligence, being an affirmative issue lying on the defendant, cannot be determined in the defendant's favour except by the verdict of the jury, for though according to the rule in *Ryder v. Wombwell* (a), where there is no reasonable evidence in support of the affirmative of an issue, the judge may decide the negative for himself, he cannot *e converso* where the evidence is conclusive in favour of the affirmative decide the affirmative for himself. It has accordingly been argued that although the plaintiff may admit acts or omissions which irresistibly point to a want of proper care on his part, yet as the question whether such acts or omissions do or do not amount to negligence is a question of fact, and as that fact is never admitted, the issue cannot be withdrawn from the jury, since *ad questionem facti non respondent iudices* (b); and that wherever, therefore, there is evidence of negligence on the part of the defendant conducing to the accident, upon which evidence, apart from any consideration of the character of the plaintiff's conduct, the jury might not unreasonably find a verdict for the plaintiff, the judge can never nonsuit. This was the view entertained by the majority of the House of Lords in the case of *Dublin, Wicklow, &c., R. Co. v. Slattery* (c).

On the other hand, it has been said that where upon the uncontradicted evidence the inference in favour of the affirmative of an issue is irresistible the *onus* of proof is shifted, and if no reasonable evidence be then offered in support of the negative the judge may find the affirmative to be proved; and that, although according to the rule laid down in *Ryder v. Wombwell* (d), the judge ought only to withdraw the case from the jury in the event of there being no evidence "on which the jury could properly find the question for the party on whom the *onus* of proof lies," yet the expression "the party on whom the *onus* of proof lies" means "not the party on whom it lay at the beginning of the trial (e), but the party on whom, on the undisputed facts, it

(a) (1868) L. R. 4 Ex. 32.

(b) "Questions of fact are not for the Court."

(c) (1878) 3 App. Cas. 1155, *per* Lord Cairns, pp. 1167; *per* Lord Selborne, p. 1189; *per* Lord Penzance, p. 1176;

per Lord O'Hagan, p. 1182; and *per* Lord Gordon, 1217.

(d) (1868) L. R. 4 Ex. p. 38.

(e) Who on the issue of contributory negligence is the defendant; see above, p. 510.

lay at the time of the direction given" (a). And it has therefore been contended that where the facts of the plaintiff's conduct are admitted, the question whether that conduct amounts to negligence is a question of fact for the jury only where it is open to doubt whether the inference of negligence ought to be drawn, but that where the inference is irresistible it becomes one of law for the judge. This was the view taken by Lords Hatherley and Blackburn in *Dublin, Wicklow, &c. R. Co. v. Slattery* (b), by Brett, M.R., in *Davey v. London & South-Western R. Co.* (c), and by Lords Watson, Blackburn and Fitzgerald in *Wakelin v. London & South-Western R. Co.* (d).

This, no doubt, is much the more convenient doctrine, for it avoids the necessity of an application to the Court of Appeal to do that which, according to the opposite view, the judge at the trial had no power to do (e). The expressions of opinion, however, by the Lords in *Wakelin v. London & South-Western R. Co.* were merely *obiter dicta*, and so far as the cases now stand, the weight of authority is the other way.

Closely connected with the subject of contributory negligence is the rule that where a source of danger has been brought about by the wrongful act or omission of the defendant, a person who is injured in consequence of coming into contact with that source of danger cannot be heard to complain if he voluntarily came into such contact with full knowledge of the danger and courted the consequences. *Volenti non fit injuria.*

(a) *Per* Lord Blackburn, (1878) 3 App. Cas. p. 1209.

(b) (1878) 3 App. Cas. pp. 1169, 1209.

(c) (1883) 12 Q. B. D. 70.

(d) (1886) 12 App. Cas. 41.

(e) In *Millar v. Toulmin*, (1886) 17 Q. B. D. 603, it was held that the Court of Appeal, on an appeal from the order of a Divisional Court on an application for a new trial, had power under Order LVIII. r. 4, to draw inferences of fact, although inconsistent with the finding of the jury, and to enter judgment for the party in whose favour the verdict ought to have been given, instead of directing a new trial. On appeal to the House of Lords the judgment of the

Court of Appeal in that case was reversed on the facts, but Lord Halsbury expressed strong doubts whether Order LVIII. r. 4, gave any such jurisdiction as that which the Court had claimed to exercise. In *Allcock v. Hall*, (1891) 1 Q. B. 444, however, the Court of Appeal, notwithstanding Lord Halsbury's doubts, adhered to their original view, and held further that the power so given to them by that rule was not taken away by Finlay's Act (53 & 54 Vict. c. 44), under which applications for new trials are made directly to the Court of Appeal, and not in the first instance to the Divisional Court.

*Volenti non
fit injuria.*

THE COURT OF APPEALS IN THE CASE OF *Thomas v. Quartermaine* (1887) 18 Q. B. D. p. 696. The court held that the owner of a private premises is not liable for damage to a person coming there by the negligence of the owner, but only for damage to a person coming there by the negligence of the owner if the source of danger is perfectly apparent to the person coming there.

See also *Thomas v. Quartermaine* (1887) 18 Q. B. D. p. 696.

The court held that the owner of a private premises is not liable for damage to a person coming there by the negligence of the owner, but only for damage to a person coming there by the negligence of the owner if the source of danger is perfectly apparent to the person coming there. The court held that the owner of a private premises is not liable for damage to a person coming there by the negligence of the owner, but only for damage to a person coming there by the negligence of the owner if the source of danger is perfectly apparent to the person coming there.

(a) Per Bowen, L.J. *Thomas v. Quartermaine*, (1887) 18 Q. B. D. p. 696. (b) See *Giles v. London County Council*, (1904) 2 L. G. R. 326.

is under no duty to do anything, and if it is non-apparent the moment he has given warning of its existence his duty is at an end (a). In such cases the knowledge of the plaintiff is of itself a complete answer to an action. Such knowledge is an answer, because in the defendant's conduct in permitting the existence of the danger there is under the circumstances nothing wrongful (b). But the owner where the danger is non-apparent will not get rid of his duty by merely publishing a general notice of that danger; he must bring it home to the mind of the plaintiff; there must be actual knowledge, reasonable means of knowledge is not enough. Thus, where the plaintiff came upon business on to the defendant's premises and was bitten by the defendant's dog, which was chained up in the yard, against the palings of which was a notice "Beware the dog," painted in letters three inches long on a board, it was held that, as the plaintiff was unable to read, the fact of the notice did not disentitle him to recover (c). Further, to constitute such knowledge of the danger as will afford a defence, it is not enough that the plaintiff should know that there is some degree of risk; he must appreciate the full extent of it; "there may be a perception of the existence of the danger without comprehension of the risk" (d). This rule, that at common law the duty of the owner in the case of private premises is discharged by giving warning, applies as well towards servants as towards other licensees (e). It has been held that

(a) See above, pp. 481, 489.

(b) *Per* Bowen, L.J., *Thomas v. Quartermaine*, (1887) 18 Q. B. D. p. 696.

(c) *Sarch v. Blackburn*, (1830) 4 C. & P. 297; and see *per* Bayley, J., *Iddt v. Wilkes*, (1820) 3 B. & Ald. p. 313.

(d) *Per* Bowen, L.J., *Thomas v. Quartermaine*, (1887) 18 Q. B. D. p. 696. If a person places in the hands of another a complicated and dangerous machine, with the nature of which that other is unacquainted, the former does not discharge his duty by merely informing him generally that it is dangerous and requires care in using, he must go further and explain the details of the danger. See, too, *Inder-*

maur v. Dames, (1866) L. R. 1 C. P. p. 276.

(e) *Williams v. Clough*, (1858) 3 H. & N. 258; *Griffith v. London & St. Katharine Dock Co.*, (1884) 13 Q. B. D. 259. But see Workmen's Compensation Acts, 1897 and 1900. In cases arising under the Employers' Liability Act, 1880, the employer will discharge his duty by bringing fully home to the mind of the workman the dangerous nature of the premises, for under that Act workmen are placed in the same position as strangers coming on business. See *per* Bowen and Fry, L.JJ., in *Thomas v. Quartermaine*, (1887) 18 Q. B. D. pp. 694, 703. As to the duty towards strangers, see above, pp. 481 *sqq.*

there is a common law duty, even as towards trespassers, not to create, without notice, a source of danger on private premises with the intent of thereby causing grievous bodily harm to persons trespassing there (a); but if notice of the danger be brought home to the plaintiff the duty as towards him is discharged, and he consequently cannot recover (b).

In all these cases where upon the admitted facts the only inference open is that the plaintiff had full knowledge of the nature and extent of the danger there is nothing further to inquire into, and the judge is bound to nonsuit (c). But as in the majority of cases the admitted facts allow of more inferences than one, the question whether the plaintiff had such full knowledge must in general be submitted to the jury.

The actual decision in *Smith v. Baker* (d), does not in any way contravene the proposition stated above. And though Lord Herschell there expressed disapproval of *Thomas v. Quartermaine*, Lord Morris approved it. It is submitted that *Thomas v. Quartermaine* was rightly decided. The plaintiff's case must rest upon negligence, and to entitle him to have the case submitted to a jury he must give *some* evidence of negligence. But if the defendant's duty in respect of his premises is alternative, namely, either to have them safe or to give warning of their unsafety where it is not apparent, a plaintiff who merely proves a danger which is perfectly apparent gives *no evidence* of any negligence at all. The whole question therefore turns on whether the defendant's duty is so alternative, and it is submitted that the cases above cited (p. 482) clearly establish that it is.

Cases where mere knowledge of the danger is not sufficient.

But there exists at common law a positive duty not to permit the existence of a danger in a place to which there is an absolute right of access, such as a highway, or a market-place, or a railway station, and in such case notice to the plaintiff, however ample, and however clearly it may bring home the extent of the danger to his mind, does not get rid of the duty towards him. He is entitled, in preference to foregoing the exercise of his rights, to

(a) *Bird v. Holbrook*, (1828) 4 Bing. 628; but the existence of such duty has been doubted; see *Jordin v. Crump*, (1841) 8 M. & W. p. 789. See above, pp. 154 *sqq.*

(b) *Holt v. Wilkes*, (1820) 3 B. & Ad. 304.

(c) *Thomas v. Quartermaine*, (1887) 19 Q. B. D. 685.

(d) (1891) A. C. 325.

run the risk which the defendant's wrongdoing has occasioned, provided that the risk be not so serious as to be altogether out of proportion to the benefit to be secured. Thus where the defendants had wrongfully made a dangerous trench in the only outlet from a mews, leaving only a narrow passage upon which they heaped rubbish, which passage was not guarded by any proper fence, and the plaintiff, a cabman, attempted in the exercise of his calling to lead his horse out over the rubbish, whereupon the horse fell into the trench and was killed, it was held that, as the danger was not "so great that no sensible man would have incurred it," the plaintiff was entitled to recover (a). So, where the defendants, the owners of a cattle-market, maintained in the market-place a spiked railing so low as to be dangerous to cattle resorting to the market, it was held that the plaintiffs, who brought to the market a cow, which, in attempting to jump the railing was killed, were entitled to recover although the danger of the railing was perfectly open and apparent (b). It is on this same ground also that the case of *Osborne v. London & North-Western R. Co.* (c) may be rested. There the plaintiff, a season-ticket holder on the defendants' line, was injured by falling down some steps in the defendants' railway station, which steps the defendants suffered to be slippery and dangerous owing to their being caked with snow. The plaintiff was held entitled to recover although he admitted that he saw the steps were dangerous. In this case the Divisional Court indeed seem to have gone upon the ground that the plaintiff's admission only went to show that he had *some* knowledge of the danger, not that he knew the full extent of the danger. But it is submitted that the case may be also rested upon the wider ground above mentioned. Had the plaintiff's comprehension of the risk been ever so complete, it is apprehended that that would not under the circumstances have availed the defendants. That comprehension would not have got rid of the defendants' duty. The plaintiff would still have been entitled to attempt to descend the steps and to look to the defendants for the consequences, for there would have

(a) *Claydon v. Dethick*, (1848) 12 (1879) 5 Ex. D. 28.
Q. B. 439.

(c) (1888) 21 Q. B. D. 220.

(b) *Lox v. Corporation of Darlington*,

been nothing in the condition of things to make the attempt altogether unreasonable. A railway station is not like a private shop into which members of the public have no absolute right to go. Everyone who desires to travel by train has an absolute right to go into a railway station. For a railway company are common carriers of passengers in the sense that they are bound to carry everyone who applies (*a*). Such a station, although in one sense private premises, is for this purpose much more like a public highway.

In the recent case of *Fraser v. Caledonian R. Co.* (*b*), it was held by the Court of Session that the plaintiff was entitled to sue the defendants for personal injuries occasioned by reason of the railway company:—

(1) Failing to provide a sufficient staff of servants for the requirements of their business:

(2) Negligently permitting the overcrowding of a platform by intending passengers.

Again, a duty not to permit the existence of a danger exists in certain cases by statute, even in respect of private premises, such, for instance, as the duty imposed on the owner of machinery to fence it (*c*), or of a mine-owner to have a banksman constantly in attendance at the pit's mouth (*d*), in which cases, though the plaintiff has full notice of a breach of the duty, the duty nevertheless remains. Again, where a duty exists by contract, the effect of a breach of it is not got rid of by the plaintiff's knowledge of the condition of things which that breach has brought about. Thus if a railway train overshoots the platform so as to bring the carriage in which the plaintiff is being carried as a passenger opposite to a spot at which it is more or less dangerous to alight, and those in charge of the train do not put back, the company have committed a breach of their contract of carriage, and the plaintiff, though he may see the full extent of the danger, is not, unless the danger is very great, bound to let himself be carried beyond his destination, but may run a reasonable degree of risk in attempting to alight, and, if he suffers damage in so doing, look

(*a*) *Denton v. Great Northern Ry.*, 937.
(1856) 5 E. & B. 860.

(*b*) (1903) 5 F. 41, Ct. of Sess.

(*c*) *Clarke v. Holmes*, (1862) 7 H. & N.

(*d*) *Badddeley v. Earl Granville*, (1887)
19 Q. B. D. 423.

to the company for compensation (a). And in such or cognate circumstances, damages are recoverable for nervous shock occasioned by fright, even when there may be little or no perceptible injury resulting from the actual impact (b).

It seems then that in the application of the maxim *Volenti non fit injuria* to the two classes of cases above discussed, the word "voluntary" is used in two wholly different senses. As applied to the first class, in which the defendant's duty is discharged by giving sufficient warning of the danger, the statement that the plaintiff's conduct in incurring the risk was voluntary, means (in the absence of a contract to hold the defendant harmless for the consequences) nothing more than that he had such a complete knowledge of the nature and extent of the risk as to negative the existence of any breach of duty on the part of the defendant. As applied to the second class, in which the defendant's duty is not discharged by giving warning, the phrase means that the plaintiff, though entitled to run some degree of risk in order to avoid the consequences of the defendant's wrong-doing, in fact ran a risk of a greater degree than was under the circumstances of the case reasonable. In this latter context the defence embodied in the maxim is nothing but a branch of the defence of contributory negligence.

Different meanings of term "volenti."

But there is yet a third sense in which the word "voluntary" has been used in connection with the application of the maxim now under discussion. In cases in which there is a contractual relation between the parties, such as that of employer and employed, the defendant has frequently sought to shelter himself under the maxim on the ground that the plaintiff has expressly or impliedly agreed, as one of the terms of his contract with the defendant, that in the event of his being injured by the defendant's act of omission, he will hold the defendant harmless for the consequences. The source of danger in connection with which the plaintiff may run a risk of injury may be one or other of two

Where plaintiff contracts to take risk on himself.

(a) *Per* Brett, J., *Adams v. Lancashire & Yorkshire R. Co.*, (1869) L. R. 4 C. P. p. 744.

(b) *Cooper v. Caledonian Ry.*, (1902) 4 F. 880, Ct. of Sess.; *Dulieu v. White*, (1901) 2 K. B. 669. For an interesting

comparison between *Dulieu v. White*, and the decision of the Privy Council in *Victorian Ry. Commissioners v. Coultas*, ((1888) 13 App. Cas. 222), see "Sington on Negligence," pp. 35 *sqq.*

kinds: first, it may consist in an existing dangerous condition of things, by bringing himself into contact with which the plaintiff injures himself, as where he walks into an unfenced hole in a floor, or handles to his damage defective machinery or plant, in which cases the last act preceding the injury is the act of the plaintiff himself; secondly, the source of danger may consist in the likelihood (owing to a course of conduct on the part of the defendant known to the plaintiff) that a positive act may be done *in futuro* which may directly injure the plaintiff, in which cases the last act preceding the injury is the act of the defendant, or of those for whom he is responsible. The defence that the plaintiff's act was voluntary in the sense above mentioned, namely, that he contracted to take the risk of injury upon himself, is applicable to cases of risks run in connection with both the above kinds of sources of danger, but it is more important in connection with the latter; for in such latter cases it is only as evidence of the existence of such a contract that knowledge on the part of the plaintiff of the source of danger can be material. If it were otherwise, and if mere knowledge of the dangerous course of conduct would suffice to relieve the defendant of responsibility for his acts, that defence would be applicable just as much where the plaintiff was a stranger as where he was a person standing in a contractual relation towards the defendant; and it seems clear that a stranger, who knows the defendant to be habitually negligent in a particular matter, could not merely by reason of such knowledge be held to go at his peril into the neighbourhood of the spot where the defendant is conducting the negligent operations. To use the illustration put by Mellish, L.J., in *Woodley v. Metropolitan District R. Co. (a)*, if a street scraper, who is employed to scrape a particular street, has had for a fortnight the opportunity of observing that a particular cabman drives his cab with very little regard for the safety of the men engaged in scraping the streets, and at the end of that time is negligently run over by the cabman it does not lie in the cabman's mouth to say, "You know my style of driving; you have seen me drive for a fortnight; I was only driving in my usual style." In that case the defendants employed an independent contractor to do certain work in a tunnel

(a) (1877) 2 Ex. D. p. 394.

belonging to them. The plaintiff, a servant of the contractor, was engaged on the work in the tunnel, which was dark and rendered dangerous by the frequent passing of the defendants' trains, and after he had been working there for some time with full knowledge that the defendants were taking no precautions for his protection, he was negligently injured by a passing train. It was held by the Court of Exchequer, and by Mellish and Baggallay, L.JJ., in the Court of Appeal, that the railway company were responsible (a).

But the question whether in any case the plaintiff has contracted to hold the defendant harmless for injury resulting from his wrong-doing, is a question of fact not of law, and must invariably be submitted to the jury. In *Smith v. Baker* (b) the plaintiff was employed by the defendants to drill holes in a rock cutting near a crane, which was being used for the purpose of raising stones. The crane was periodically swung round with stones over the plaintiff's head without warning. The plaintiff was aware of the danger arising from the practice of omitting to give warning, and had so worked for months when a stone fell and injured him. It was held by the House of Lords that the mere fact of the plaintiff having remained on in the defendant's service with knowledge of the dangerous practice did not as matter of law preclude him from recovering, and that it was a question for the jury whether he had contracted to take the risk of accidents upon himself. So too in *Yarmouth v. France* (c), where the plaintiff, who was in the employment of the defendant, was required by the defendant's foreman, notwithstanding his remonstrance, to drive a horse which he knew to be vicious, and while driving it was injured by the horse kicking him, it was held to be a question for the jury whether the plaintiff, in driving the horse after knowledge of its vice, had taken the risk upon himself.

(a) *Woodley v. Metropolitan District R. Co.*, (1877) 2 Ex. D. 384. It is true that in this case the majority of the Court of Appeal (Cockburn, C.J., Mellor and Grove, JJ.) held otherwise. But in the later case of *Membery v. Great Western R. Co.*, (1889) 14 App. Cas. 179, Lords Halsbury and Herschell were

evidently of opinion that the view of Mellish, L.J., was to be preferred. In *Woodley's case* Mellish, L.J., lays stress on the fact that there was no contractual relation between the plaintiff and the defendants.

(b) (1891) A. C. 325.

(c) (1887) 19 Q. B. D. 647.

STATUTORY LIMITATION AS TO FIRE (a).

Ontario. 14 Geo. III. c. 78, s. 86 (which is an extension of 6 Anne, c. 31, ss. 6, 7), is in force in Ontario as part of the law of England introduced by the Constitutional Act (31 Geo. III. c. 31). It has no application to relieve a person from legal liability as a consequence of negligence (b).

PROJECTIONS OVER HIGHWAY (c).

Ontario. Where a cornice overhanging the sidewalk being loosened by ordinary decay fell and injured the plaintiff, the owner was held liable without proof of knowledge on his part of the dangerous condition of the cornice, the defect being one that could have been ascertained by him by reasonable inspection (d).

PROJECTING ICE OR SNOW.

Ontario. A number of cases have arisen where action has been brought because of injuries by snow or ice falling from a roof. The head-notes to these cases seem to require, as a condition precedent to a valid claim, a by-law of the municipality requiring citizens to keep their roofs clear of ice and snow (e). If this were so, a collection ought to be made of municipal by-laws establishing torts as between citizen and citizen. But a perusal of these cases will show that the importance of the by-law is as evidence of faulty construction or notice to the defendant of the dangerous state of his roof.

New Brunswick. In erecting a building the owner may adopt any style of architecture he pleases, provided he does not create a nuisance or violate any law or municipal ordinance; therefore the construction of a roof with projecting eaves which cause an accumulation of ice and snow is not *per se* evidence of negligence, although it may impose upon the owner a greater degree of watchfulness and care in order to prevent accidents (f).

HORSE ON HIGHWAY (g).

Ontario. The same rule as in the English decisions has been applied that, in the absence of proof of knowledge of vicious propensity, the owner is not liable (h).

(a) P. 435, *supra*.

(b) *Canada Southern R. W. Co. v. Phelps*, 14 S. C. R. 132.

(c) P. 439, *supra*.

(d) *Roberts v. Mitchell*, 21 A. R. 433; cf. *Ferrier v. Trepannier*, 24 S. C. R. 86, fall of window.

(e) *Laudreville v. Gouin*, 6 O. R. 455, notice given by policeman acting under

by-law; *Lazarus v. City of Toronto*, 19 U. C. R. 9.

(f) *Dugal v. People's Bank of Halifax*, 34 N. B. R. 581.

(g) P. 445, *supra*.

(h) See *Flett v. Gaultier*, 5 O. L. R. 375; *Patterson v. Fanning*, 2 O. L. R. 462, distinguished.

NATURAL PROPENSITIES OF DOGS (a).

Proof of knowledge by the defendant of the vicious propensities of a dog *attacking a person* is necessary to found an action (b). **Ontario.**

Sheep are better protected than mere humanity, as statutes intervene to do away with the necessity for proof of scienter or propensity (c).

The larceny of dogs (d) is punishable under the Criminal Code of Canada, R. S. C. 1906, c. 146, s. 370.

VIS MAJOR: FLOODS (e).

Where the sudden rising of a navigable river made a jam of the defendant's logs to the injury of the plaintiff's bridge, it was held negligence, not *vis major* (f). **Canada.**

Where one vessel was moored to another and, an extraordinary storm arising, bumped the other and damaged her :—Held, that it was not shown that such mooring was *per se* negligence, and that the defence of *vis major* was valid (g). **British Columbia.**

BOARDING-HOUSE KEEPER (h).

It is well in considering a case of loss of boarder's goods to examine if the facts come within any provincial statute. The following are similar enactments :—

R. S. O. 1897, c. 187 (An Act respecting Innkeepers).

Ontario.

C. O. N. W. T. 1898, c. 56 (The Hotel Keepers Ordinance).

**Alberta
and Sas-
katchewan.**

R. S. B. C. 1897, c. 98 (The Innkeepers Act).

**British
Columbia.**

R. S. M. 1902, c. 75 (An Act respecting Hotel and Boarding-house Keepers). **Manitoba.**

There is a distinction for some purposes (i) between the relation of innkeeper and guest and that of boarding-house keeper and boarder (k). It is possible that the decision in *Scarborough and Wife v. Cosgrove* (l) is broad enough to bring a

(a) Pp. 447, 451, *supra*.

(b) See *Vaughan v. Wood*, 18 S. C. R. 703.

(c) *E.g.*, R. S. O. 1897, c. 271 (Protection of Sheep and Tax on Dogs). See *Reg. v. Perrin*, 16 O. R. 446; *Fox v. Williamson*, 20 A. R. 610.

(d) P. 448, *supra*.

(e) P. 453, *supra*.

(f) *Ward v. Township of Grenville*, 32 S. C. B. 510; 21 Occ. N. 444. Cf. *Valiquette v. Fraser*, 9 O. L. R. 57, as to

exceptional wind.

(g) *Bailey v. Cates*, 11 B. C. R. 62 (1904).

(h) P. 458, *supra*.

(i) *E.g.*; nature of lien on goods.

(k) *Newcombe v. Anderson*, 11 O. R. 665 (1886); see the cases collected in this case. Cf. *Rees v. McKeown*, 7 Ont. A. R. 521; *Reg. v. Askin*, 20 U. C. R. 626.

(l) P. 458, *supra*.

boarding-house keeper within the interpretation of an innkeeper or hotel keeper in the above statutes.

VEHICLES AND DRIVING (a).

Ontario. The method of alighting from a carriage preparatory to fastening the horse is discussed in *Sullivan v. McWilliam* (b), where the horse bolted just after the driver alighted. The duties and rights of the driver of a sleigh overtaken and overturned are considered in *Derlin v. Bain* (c).

COLLISIONS BY SHIPS (d).

British Columbia. Where a vessel is at anchor or made fast to a wharf, the onus is on the other ship colliding, and the "collision regulations" do not apply (e).

INVITATION—PERSONS COMING ON BUSINESS (f).

Ontario. The invitation may be somewhat indirect, and the interest of the owner in the business may be second hand. Thus, in the "merry-go-round" case (g) the plaintiff was hurt on one of the "attractions" of the annual fair, which broke owing to a defect. The defendants charged a fee for general admission and a licence fee to the owners of attractions, who charged a further fee:—Held, that these owners were licensees (h), not lessees, and the defendants had a right of supervision, which they were negligent in not exercising, and liable to the plaintiff for holding out an invitation to use a negligently constructed "merry-go-round."

BARE LICENSEES (i).

British Columbia. Where the engineer allowed N., who had a bridging contract on the road, to ride on the locomotive, it was held that N. was a bare licensee, with no right of action unless injured by the *dolus* as distinguished from the *culpa* of the carrier (k).

TRESPASSER (l).

Canada. Among the many privileges enjoyed in this country by an overholding tenant is that, though in some respects a trespasser

(a) P. 459, *supra*.

(b) 20 A. R. 627.

(c) 11 U. C. C. P. 523; cf. *Robinson v. Bletcher*, 15 U. C. R. 159. The duty to pedestrians is considered in *Brown v. Heather*, 8 C. L. J. 86.

(d) P. 460, *supra*.

(e) *Ward v. "Yosemite"*, 3 B. C. R. 311; *Bank Shipping Co. v. City of Seattle*, 10 B. C. R. 513.

(f) P. 481, *supra*.

(g) *Flynn v. Toronto Industrial Exhibition Association*, 9 O. L. R. 582.

(h) Cf. *Marshall v. Toronto Industrial Exhibition Association*, 2 O. L. R. 62, where one of these licensees was injured.

(i) P. 491, *supra*.

(k) *Nightingale v. Union Colliery Co.* 9 B. C. R. 453.

(l) P. 492, *supra*.

or bare licensee, he may still maintain an action if his goods are injured by the negligence of workmen employed by the landlord to alter other portions of the building from which the overholding tenant has not yet been ejected (a). **Canada.**

ONUS OF PROOF IN CASE OF CARRIERS (b).

There is a tendency of the Courts to read into contracts exempting carriers from liability for loss of goods the words "if not occasioned by the negligence of the defendants" (c). **British Columbia.**

Where the evidence showed that the lumber was loaded at P., and that a portion of it was not delivered at B., an endorsement on the shipping bill "that the company will not be responsible for any deficiency, &c.," was not allowed as a defence against loss happening through the defendants' negligence. It was further held that in the absence of evidence the non-delivery might be assumed to have arisen from mis-delivery or from appropriation by the defendants (d). **Manitoba.**

NEGLIGENCE MUST BE CAUSE OF INJURY (e).

In cases of negligence it is not essential, as in insurance cases, that the *proximate* cause should alone be regarded. It is sufficient if an *efficient* cause of the thing complained of is found in some tortious act of the defendant (f). **New Brunswick.**

HEAVY VEHICLE v. LIGHT VEHICLE (g).

A very frequent case of the heavy v. light collision is when the electric car of a street railway strikes a waggon at the junction of two streets. The usual allegations of negligence include "excessive speed of the car, lack of control of the car and brakes by the motorman and inattention on his part to the duty of looking out for crossing vehicles" (h). **Ontario.**

(a) *Sierert v. Brookfield*, 35 S. C. R. 494.

(b) P. 497, *supra*.

(c) See *Hamilton v. Hudson's Bay Co.*, 1 B. C. R., pt. ii., 1, 176.

(d) *Henry v. Canadian Pacific R. W. Co.*, 1 M. L. R. 210. Where there are several carriers, the last carrier is liable: *Roach v. Canadian Pacific R. W. Co.*, 1 M. L. R. 158.

(e) P. 498, *supra*.

(f) Per King, J., in *Rainnie v. The St. John City R. W. Co.*, 31 N. B. R. 582.

(g) P. 501, *supra*.

(h) See *Liddiard v. Toronto R. W. Co.*, 7 O. W. R. 207 (1906). This case is another instance of how a number of carefully selected questions to be answered "yes" or "no" by the jury will produce results that require a Divisional Court to unravel.

PRINCIPLE IN *DAVIES v. MANN* (a).

Ontario Where a waggon is left standing in the highway the owner cannot defend himself by showing that the person injured thereby was drunk (b).

Nova Scotia. Apparently a foot passenger is not to be bound down to a conventional way of crossing the street (c).

CONTRIBUTORY NEGLIGENCE OF CHILD OF TENDER YEARS (d).

Canada. *Gardner v. Grace* (e) has been followed by the Supreme Court of Canada (f).

PASSENGER IN VEHICLE (g).

Ontario. The doctrine that the occupant of a carriage is not identified as to negligence with the driver applies only where the occupant is a mere passenger having no control over the management of the carriage. Where, therefore, the hirer of a carriage allows one of his friends to drive and an accident results from the latter's negligence the former cannot recover against the municipality (h).

ONUS OF PROOF (i).

Ontario. In an action for negligence tried with a jury where contributory negligence is set up, the onus of proof of the two issues is respectively upon the plaintiff and the defendant, and, though the judge may rule negatively that there is no evidence to go to the jury on either issue, he cannot declare affirmatively that either is proved; the question of proof is for the jury (k).

The question of negligence is for the jury, but what facts may by them be considered is a question of law (l).

New Brunswick. It is too late to raise the defence of contributory negligence on an application for new trial (m)

(a) Pp. 501, 502, *supra*.

(b) *Ridley v. Lamb*, 10 U. C. R. 354; but see *McGunigal v. Grand Trunk R. W. Co.*, 33 U. C. R. 194, railway killing team of drunken plaintiff.

(c) See *Gilbert v. Municipality of Yarmouth*, 23 N. S. R. 93; *Fraser v. Town of New Glasgow*, 24 N. S. R. 422.

(d) P. 507, *supra*.

(e) 1 F. & F. 359.

(f) *Merritt v. Hepenstal*, 25 S. C. R. 150; *Sungster v. T. Eaton Co.*, 24 S. C. R. 708; cf. *McIntyre v. Buchanan*, 14

U. C. R. 581.

(g) P. 509, *supra*.

(h) *Flood v. Village of London West*, 23 A. R. 530.

(i) P. 510, *supra*.

(k) *Morrow v. Canadian Pacific R. W. Co.*, 21 A. R. 149, distinguishing *Weir v. Canadian Pacific R. W. Co.*, 16 A. R. 100.

(l) *Sandilands v. Bathgate*, 9 C. L. J. 328.

(m) *Marrin v. Butterwell*, Stevens Dig., 3rd ed., p. 536.

A plaintiff is not guilty of contributory negligence for not **Nova Scotia.** having selected the safest way of doing what he was required to do provided he used a reasonable way to do it (a).

Mere failure to take unusual care is not enough to constitute contributory negligence; the plaintiff must have failed to use ordinary care (b).

Where the jury find negligence on the part of the defendant, and also find that the plaintiff had been negligent, this is equivalent to finding that the accident would not have happened but for the plaintiff's own negligence, and he cannot recover (c).

A finding of contributory negligence may be neutralised by a finding that the accident might have been averted by a greater degree of care on the part of the defendant or his servant (d).

NON-SUIT ON CONTRIBUTORY NEGLIGENCE (e).

In actions for negligence the power of the judge to non-suit on **Ontario.** the ground of contributory negligence is restricted to cases where it is plain and indisputable that the injury of which the plaintiff complains would not have occurred but for his own want of proper care. Where the facts, or the proper inference from the facts, are in dispute, the case must go to the jury (f).

In negligence cases the power to take a case away from the jury should be exercised only when it is clear that the plaintiff **British Columbia.** could not hold a verdict in his favour. If the matter is reasonably open to doubt, the judge should let the case go to the jury, and then decide, if necessary, whether there is any evidence on which the verdict can be supported (g).

A statement by the judge that he could not understand how **Nova Scotia.** the negligence of the deceased contributed to the accident is to tell them that there is no evidence tending to show that fact, even if they are told that they may be able to see evidence of it; and is a misdirection (h).

(a) *Day v. Dominion Iron and Steel Co.*, 36 N. S. R. at p. 125 (1903).

(b) *Drake v. Town of Dartmouth*, 25 N. S. R. 177.

(c) See *London Street R. W. Co. v. Brown*, 31 S. C. R. 642 (for form in which question should be put to jury, see this case in 2 O. L. R. 53); *Lennon v. Canadian Niagara Power Co.*, 6 O. W. R. 885; *Weir v. Town of Amherst*, 38 N. S. R. at p. 488 (1906).

(d) *Ingles v. Halifax Electric Tram Co.*, 32 N. S. R. 117; 30 S. C. R. 256.

(e) P. 511, *supra*.

(f) *Scriven v. Lowe*, 32 O. R. 290, case where plaintiff first saw the danger and

afterwards lost sight of it and was injured. Cf. *Heuth v. Hamilton Street R. W. Co.*, 7 O. W. R. 459; *Sims v. Grand Trunk R. W. Co.*, 10 O. L. R. 332 (1905); *Morrow v. Canadian Pacific R. W. Co.*, 21 A. R. 149 (1894); *Vallee v. Grand Trunk R. W. Co.*, 1 O. L. R. 224 (1901); *Preston v. Toronto R. W. Co.*, 11 O. L. R. 56; *Peart v. Grand Trunk R. W. Co.*, 10 O. L. R. 753, decision of Privy Council.

(g) *Nightingale v. Union Colliery Co.*, 9 B. C. R. 453, *per* Hunter, C.J.

(h) *Hawley v. Wright*, 37 N. S. R. 77 (1904).

action for a false representation as to a mere matter of opinion lies in the difficulty of proving what the defendant's real opinion was.

Misstatement
of legal
position.

A misrepresentation as to a person's legal position may be a sufficient misstatement of fact to afford matter of defence; thus a fraudulent misstatement as to the legal effect of a deed will preclude the party guilty of the fraud from enforcing the deed (a). And a similar rule prevails where, in the absence of independent advice, a material fact has been kept back from the knowledge of the party executing the deed (b), but whether such concealment or misstatement will give a cause of action for deceit has apparently never been decided, though there seems to be no valid reason why it should not (c).

A misrepresentation may be either express, or implied from conduct.

Express
representa-
tion.

Even where a representation is in express terms it may be open to question what is to be understood by them. The proper construction to put upon the words used is not necessarily the literal one. "If a person make a representation of that which is true, if he intends that the party to whom the representation is made should not believe it to be true, that is a false representation" (d). Conversely if a statement be in terms untrue, but not intended or not calculated to be interpreted in its literal sense, it cannot be charged as a deceit. To this latter head may possibly be referred the case of exaggerated praise by a vendor (e), as where he says his goods are the best in London for the price, he knowing that the very same articles are procurable in the immediate neighbourhood at a lower price. He knows that his statement will be construed as mere puffing. Again, fragmentary statements may be in terms true so far as they go, but if they suggest that which is false, and are intended

C. P. p. 69; though in *Peek v. Gurney*, (1873) L. R. 6 H. L. p. 404, there is a passage in Lord Cairns's judgment which seems to suggest that in his view a statement of opinion is not a statement of fact.

(a) *Hirschfeld v. London, Brighton & South Coast R. Co.*, (1876) 2 Q. B. D. 1.

(b) *Barron v. Willis*, (1900) 2 Ch.

121; and see *O'Connor v. Foley*, (1905) 1 Ir. R. 1.

(c) See *West London Commercial Bank v. Kitson*, (1884) 13 Q. B. D. 360.

(d) *Per Alderson, B., Moens v. Heyworth*, (1842) 10 M. & W. p. 158.

(e) Though it may also be explained on the ground given above, that the case of vendor is anomalous.

to do so, that will constitute an actionable fraud (a). "Supposing you state a thing partially, you make as much a false statement as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it, you make a false statement. For instance, if pretending to set out the report of a surveyor, you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual misstatement" (b).

A misrepresentation may be implied from a party's conduct; if one conducts himself in a particular way with the object of fraudulently inducing another to believe in the existence of a certain state of things contrary to the fact and to act upon the basis of its existence, and damage results therefrom to the party misled, he who misled him will be just as much liable as if he had misrepresented the facts in express terms (c). If a person goes into a shop in a University town, not being a member of the University, and purchases goods on credit, the fact that he is at the time wearing a college cap and gown amounts to a representation that he is a member of the University, and, therefore, may be safely trusted, although he makes no statement in terms to that effect (d). Again it amounts to fraudulent misrepresentation, sounding in damages, for a person wilfully and deliberately to induce an innocent person to commit a statutory offence, by representing the obnoxious act as being neither illegal nor immoral (e).

Representa-
tion implied
from conduct.

Wilful incite-
ment to
commit crime.

And where a transaction between two parties is tainted by an original misrepresentation by one of them neither *laches* nor condonation will be imputed to a plaintiff who has continued to make payments (under protest) after finding out the

Repudiation
of contract
obtained by
misrepresen-
tation.

(a) See *per* Lord Cairns, *Peck v. Gurney*, (1873) L. R. 6 H. L. p. 403.

(b) *Per* James, L.J., *Arkwright v. Newbold*, (1881) 17 Ch. D. p. 318; and see *per* Lord Selborne, *Coaks v. Bonnell*, (1886) 11 App. Cas. p. 236.

(c) As to what amount and character of wilful misrepresentation will, and will not, entitle a plaintiff to an injunction restraining the defendant from

continuing a series of misstatements whereby the plaintiff is aggrieved, see *Agello v. Worsley*, (1898) 1 Ch. 274; *Walter v. Ashton*, (1902) 2 Ch. 282.

(d) *Rex v. Barnard*, (1837) 7 C. & P. 784; and see *Reg. v. Jones*, (1898) 1 Q. B. 119, a case of obtaining a meal at a restaurant.

(e) *Burrows v. Rhodes and Jameson*, (1899) 1 Q. B. 816.

misrepresentation. Such payments being held not to amount to an affirmation of the contract by him (a).

Representa-
tion of safety
implied in
issue of
chattels for
use.

An instance of misrepresentation by conduct arises in the case of issuing for use a chattel which, to the knowledge of the party issuing it, cannot safely be used in the way in which he knows that it is likely to be used. Such issue for use amounts to a representation that it may be safely used, and presumably none the less is this so where the thing is delivered in pursuance of a contract of sale.

Sale of
dangerous
chattel.

It is conceived that a person who sells a gun to another for use impliedly represents thereby that so far as he knows the gun is a safe one (b). And this representation incorporates in the act of sale itself, alike by implication of law and by statute, a warranty of such fitness; which the vendor cannot limit by a merely general repudiation of warranty applying to all the various classes of goods in which he deals. He must, in order to make such repudiation apply to the sale of a specific article, which he knows to be of an unusually dangerous nature, at the time of sale, inform the purchaser of the exceptional risk attendant upon its use (c). So, too, one who sells animals which he knows to be suffering from an infectious disease, and which he also knows the purchaser is likely to put along with other uninfected animals of his own, is presumably liable to an action of deceit if by reason of the non-disclosure of the disease such other animals of the purchaser are injured (d). Thus, where the defendant knowingly

(a) *Molloy v. Mutual Reserve Life Assurance Co.*, (1905) 22 T. L. R. 59.

(b) It is on this ground alone that the question left by Parke, B., to the jury in *Langridge v. Lery*, (1837) 2 M. & W. 519, whether the defendant warranted the gun to be a safe and secure one, can be explained; since, so far as appears from the evidence in that case, the only *express* representation was that the gun was by Nock, which did not necessarily import any statement that the gun was sound. Its being unsound was quite consistent with the representation being true.

(c) *Clarke v. Army & Navy Co-operative Society*, (1903) 1 K. B. 155, C. A. For Sale of Goods Act at length,

see Chitty on Contracts, Ch. XIII.

(d) In such cases no doubt fraud is not strictly essential to liability. It was seen above (p. 479) that where the injury resulting from the plaintiff's having been misled into acting as he did was a physical injury, it is enough to show negligence. If a person when issuing a thing for use omits from pure forgetfulness to disclose a dangerous character which he knows it to possess he is liable for any damage that ensues. But a vendor of an article which he knows to have some dangerous quality, which would render it unsaleable if disclosed, does not omit to disclose it from forgetfulness; in his case therefore the action is more appropriately framed in

sold a diseased cow at a market without disclosing the fact of the disease, and the purchaser put the cow in a field with other cattle which caught the disease and died, Blackburn, J., said, "I entertain no doubt that the defendant by taking the cow to a public market to be sold, though he does not warrant her to be sound, yet thereby furnishes evidence of a representation that so far as his knowledge goes, the animal is not suffering from any infectious disease. To say otherwise would be to run counter to the common sense of mankind" (a). In *Mullett v. Mason* (b), Willes, J., in the course of argument expressed an opinion that where a man buys an animal without any express warranty of freedom from disease, his putting it along with other animals is not the natural consequence of the purchase—otherwise, where he buys with a warranty. But with submission there seems no valid reason for any such distinction.

In yet another case (c) where the defendant sent to market some pigs suffering from typhoid fever and sold them "with all faults," and the purchaser put them with other pigs of his own which caught the fever and died, the House of Lords held that the purchaser could not recover damage for the non-disclosure; but they went expressly upon the ground that the sale was "with all faults," suggesting thereby, though they declined to decide the point, that in the absence of such a condition, the non-disclosure would have amounted to such a misrepresentation as would have founded an action of deceit (d). They apparently regarded the terms of the conditions of sale as putting the purchaser upon enquiry, and as amounting to an express negation of the representation of freedom from infectious disease which, but for that condition, would have been implied from the mere sale (e). It seems clear that where the relation between the parties is not

Loan or gift
of dangerous
chattel.

deceit. It is only where such a thing is issued gratuitously that an action for negligence is the more appropriate form.

(a) *Bodger v. Nicholls*, (1873) 28 L. T. N. S. 441. It is true, he goes on to suggest, that the case might be different if the animal were sold privately, but he gives no reason for his proposition.

(b) (1886) L. R. 1 C. P. p. 562.

(c) *Ward v. Hobbs*, (1877) 4 App. Cas. 13.

(d) See *per* Lord Cairns, *ibid.* p. 24, and *per* Lord Selborne, p. 29.

(e) The case of *Hill v. Balls*, (1857) 2 H. & N. 299, where in similar circumstances the action was held not to lie, turned entirely on the faulty framing of the declaration, which contained no averment of fraud. See the judgment of Martin, B.

Doctrine of
careat emptor
applies only
to loss of pur-
chase-money
and profit.

Not to con-
sequential
injury.

that of vendor and purchaser the party who puts an article into the hands of another to be used in a particular way is bound to warn him of any defect in the article which to his knowledge is likely to make the user dangerous. This is the rule in the case of a gratuitous loan. "By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects, known to the lender, which may make the loan perilous . . . to him" (a). A similar duty to warn of the existence of a hidden danger arises in the case of a gift (b). But if there is a duty to disclose defects which may be productive of injury, where the party acts gratuitously, it is difficult to see how his duty can be less where he acts for reward as in the case of a vendor. No doubt where a vendor sells a specific thing which the buyer has an opportunity of inspecting, he will not as a rule be liable on the contract to make good to the buyer his loss arising from the thing turning out to be worthless in consequence of the existence of some secret defect known to but not disclosed by him. So far as the buyer's loss of his purchase-money, or of any profit which he would have made if the defect had not existed, is concerned, the general rule is, *careat emptor* (c). To entitle the purchaser to recover damages for such loss mere non-disclosure is not enough, there must be some active concealment, or, as it has been termed, aggressive deceit (d); as where the seller of a vessel, whose bottom and keel were rotten, purposely took her off the ways after she had been advertised for sale and floated her in order to conceal her defective condition (e). But when the secret defect or bad quality of the thing sold is not merely such as to render the thing itself of less value, and so to cause the buyer to lose his purchase-money and profit, but is in addition noxious and dangerous and likely to produce damage to the person or other property of the buyer, in the

(a) *Per* Coleridge, J., *Blakemore v. Bristol, &c., R. Co.*, (1858) 8 E. & B. p. 1051. The duty is there spoken of as contractual, but it also arises *ex delicto*, for loans and gifts are in this respect on the same footing, and a gift cannot be regarded as a contract.

(b) *Per* Willes, J., *Indermaur v. Dames*, (1866) L. R. 1 C. P. p. 286.

(c) *Parkinson v. Lee*, (1802) 2 East. 314. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); and see *Reg. v. Rorback*, (1856) 7 C. C. C. 126.

(d) *Per* Jervis, C.J., *Keates v. Cadogan*, (1851) 10 C. B. p. 600.

(e) *Schneider v. Heath*, (1813) 3 Camp. 506, with which cp. *Baglehole v. Walters*, (1811) 3 Camp. 154.

event of his using or dealing with the thing in the way in which the seller intends him to use or deal with it, or knows that he is likely to use or deal with it, the seller must, it is apprehended, be under an obligation to disclose such secret defect or bad quality if he knows of its existence; and must, in the event of his not disclosing it, be held liable for any damage to the person or other property of the buyer naturally resulting from the user, as upon an implied representation that such defect or bad quality did not exist; though at the same time the rule of *caveat emptor* will exclude his liability to refund the purchase-money (a). The view here put forward seems no doubt at first sight to point to an inconsistency, in that it suggests that where the noxious quality of the thing sold is also the cause of the depreciation in its value the seller is at one and the same time under an obligation and yet not under an obligation to disclose the defect. But the inconsistency is only apparent; it is quite consistent with there being no obligation arising out of the contract as between vendor and purchaser that there may be an obligation imposed by law as between man and man. And further, the fact that the noxious quality is also the cause of the lessening of value and that consequently the vendor cannot disclose the one without also disclosing the other is merely accidental; cases might readily be put in which the injurious quality was wholly distinct from the cause of depreciation, and in such cases the apparent inconsistency would altogether disappear—for instance, a gun might be sold which was worthless by reason of the insufficiency of the stock and locks, but dangerous only by reason of the fact, known to the vendor, that it was loaded at the time of the sale; though the vendor would not be bound to inform the buyer as to the worthlessness of the gun, he surely would be liable for any injury caused to the buyer by reason of the non-disclosure of the fact that the gun was loaded. And if so, no substantial distinction can be drawn between the case so put and one in which the dangerous character of the article also affected the value, as for instance where the dangerous character of a gun arose from permanent defects in the barrels.

No representation of the non-existence of defects, however, is

No implied representation where

(a) As to the extent of this liability see *Clarke v. Army and Navy Co-operative Society*, (1903) 1 K. B. 155, C. A.

means of
knowledge of
both parties
equal.

to be implied from mere non-disclosure where, the means of knowledge of both parties being equal, it is under the circumstances reasonable to expect that the plaintiff will, before acting on the assumption of such defects not existing, exercise his means of knowledge and investigate the state of things for himself (a). Thus, where the defendant demised to the plaintiff a house which he knew to be in a ruinous and dangerous condition without disclosing the fact, and shortly after the plaintiff entered upon occupation the house fell down, whereby he was injured in health and his goods were damaged, it was held that he could not recover damages for such injury, for the fact of a house being ruinous is apparent to any one who takes the trouble to examine it, and it was the plaintiff's own fault that he did not make a proper investigation and satisfy himself as to the condition of the house before he entered upon the occupation of it (b).

Secret com-
mission.

Again, the payment of a bribe or secret commission, by one principal to the servant or agent of the other principal to a contract, is *prima facie* evidence of fraud and will entitle the party whose servant accepted the bribe to rescind the contract which he may have been induced subsequently to enter into with the briber (c) upon the ground that the transaction is tainted by the corrupt dealing. And the same rule applies where a sub-agent accepts a commission from the other party to a transaction without the knowledge of either the chief agent or of the principal on behalf of whom such chief agent was acting (d).

State of
defendant's
mind.

The next matter to be considered, in connection with the conditions of liability to an action of deceit, is the state of the defendant's mind as regards his knowledge of the falsity, or belief in the truth, of the representation which he makes (e).

Knowledge
of untruth of
representa-
tion.

(1.) If the defendant knows his statement to be untrue he will be responsible (f). If he have knowledge of the untruth it will

(a) Equal means of knowledge is immaterial where there is an express representation, for the plaintiff is thereby put off his guard: *Dobell v. Sterens*, (1825) 3 B. & C. 623.

(b) *Keates v. Cadogan*, (1851) 10 C. B. 591. The loss of the benefits expected to be enjoyed from the lease itself was covered by the principle of *caveat emptor*; the case is only cited

with reference to the damages *ultra*: and see *Cavalier v. Pope*, (1905) 74 L. J. K. B. 857 C. A.

(c) *Bartram & Sons v. Lloyd*, 90 L. T. 357, C. A.

(d) *Powell & Thomas v. Bran Jones & Co.*, (1905) 1 K. B. 11.

(e) *Gordon v. Street*, (1899) 2 Q. B. 641, C. A.

(f) *Pasley v. Freeman*, (1789) 3 T. B.

be perfectly immaterial that he may not have acted fraudulently in the worst sense of the term, that is to say, from a bad motive of gain to himself or of injury to the plaintiff. Thus, if a person knowing a servant to have been guilty of dishonesty recommends him as thoroughly trustworthy to another, who employs him in consequence of such recommendation, he will be responsible for the subsequent dishonest conduct of the servant, although his only object in making the untrue statement was to assist the servant in getting employment (a). So, where a bill having been presented for acceptance at the office of the drawee in his absence, the defendant wrote on the bill an acceptance as by procuration of the drawee, knowing that he had not the drawee's authority to do so, but honestly believing that the acceptance would be ratified and the bill paid, and the bill was subsequently dishonoured without ratification of the acceptance, the defendant was held liable to an indorsee for the untrue representation of authority to accept, notwithstanding that he had acted without any corrupt motive (b).

(2.) Although the party making the representation may have had no knowledge of its falsehood, yet he will be equally responsible if he had no belief in its truth, and made it "not caring whether it was true or false" (c). "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts" (d). "Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it *knows*, yet at least that he *believes* it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation

Absence of
belief in its
truth.

51. This was the first case in which fraud was held to give a cause of action between persons not parties to a contract.

(a) *Foster v. Charles*, (1830) 6 Bing. 396.

(b) *Polhill v. Walter*, (1832) 3 B. &

Ad. 114. See too *per* Lord Cairns, *Peek v. Gurney*, (1873) L. R. 6 H. L. p. 409.

(c) *Per* Smith, J., *Joliffe v. Baker* (1883) 11 Q. B. D. p. 275.

(d) *Per* Maule, J., *Evans v. Edmonds*, (1853) 13 C. B. p. 786.

which he knew to be false, or did not believe to be true" (a). This is the condition of mind referred to by Lord Cairns in *Reese River Co. v. Smith*, where he says, "I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue" (b). By the term "ignorant" he must be understood to have meant consciously ignorant, devoid of belief in the truth of their assertions (c). So, "where a man swears to a particular fact without knowing at the time whether the fact be true or false, it is as much perjury as if he knew the fact to be false" (d). It is to statements made in this manner, where the condition of the mind is purely negative as to belief, that the epithet "reckless" is properly applied (e).

That belief
unreasonable
will not
suffice.

(3.) Whether, however, in the case of a party making a misstatement which he honestly believes to be true, the mere fact of his belief in its truth is of itself a defence to an action of deceit, or whether he must not be held liable if it be shown that he was negligent in not acquiring knowledge of the untruth, in other words, that his belief was founded upon unreasonable grounds, is a question which until recently had not been definitely settled. Although the great weight of authority (f) was undoubtedly in favour of the contrary view, there was some authority (g), and much reason in principle, in favour of the view

(a) *Per* Lord Herschell, *Derry v. Peek*, (1887-9) 14 App. Cas. p. 368; and see *Pritty v. Child*, (1902) 71 L. J. K. B. 512.

(b) (1869) L. R. 4 H. L. p. 79; and see *Angus v. Clifford*, (1891) 2 Ch. 449.

(c) See *Haycraft v. Creasy*, (1801) 2 East, p. 107, where an assertion of knowledge was held to mean an assertion of belief.

(d) *Per* Lawrence, J., *Rex v. Mawby*, (1796) 6 T. R. p. 637. Here also the term "knowledge" is used in the sense of belief.

(e) The expression "recklessness" when used in this context must not be confused with mere absence of reasonable ground for believing the statement to be true. See *per* Lord Herschell,

Derry v. Peek, (1887-9) 14 App. Cas. p. 361. See too *Angus v. Clifford*. (1891) 2 Ch. 449; and see *Pritty v. Child*, (1902) 71 L. J. K. B. 512.

(f) This authority consisted almost entirely of *dicta*; the only direct decisions on the point being *Taylor v. Ash-ton*, (1843) 11 M. & W. 401; and possibly the judgment of Bramwell, L.J., in *Dickson v. Reuter's Telegram Co.*, (1877) 3 C. P. D. p. 6.

(g) *Ex. gr.* the judgment of Maule, J. in *Shrewsbury v. Blount*, (1840-1) 2 M. & G. 475; that of Lord Chelmsford in *Western Bank of Scotland v. Addi-* (1867) L. R. 1 Sc. App. p. 162, and that of Jessel, M.R., in *Smith v. Chadwick* (1882) 20 Ch. D. 27.

that liability for misrepresentation is not limited to cases of fraud, that is to say, cases in which there is actual knowledge of the untruth, or absence of belief in the truth of the statement, but that there is also a liability where, the defendant, though honestly believing in the truth of his statement, had no reasonable grounds for such belief, and made the statement without taking ordinary care to ascertain whether it was true or false. But in the year 1889 it was finally settled by the House of Lords in *Derry v. Peek* (a) that it is essential to an action of deceit that there should be actual fraud, a guilty intention to deceive, and that a merely negligent misrepresentation, however gross the negligence may be, will not suffice. The decision in this case does not, however, avoid the rule laid down in *Collen v. Wright* (b), and approved in *Oliver v. Bank of England* (c) "that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it understood that it was true, and he is liable personally for the damage that has occurred."

Moreover it is not enough that the defendant should at one time have had knowledge of facts contrary to the representation that he makes, if at the time of making the representation he has honestly forgotten those facts. It was indeed formerly thought otherwise. Thus in *Brownlie v. Campbell* (d) Lord Selborne said, "The mere forgetfulness by a man who has known a certain fact, who is asked whether that fact has happened or not, and says positively that it did or did not, cannot possibly be an excuse; because if he had spoken the simple truth he would have said, 'I do not recollect whether it is so or not.'" In *Slim v. Croucher* (e), A. having applied to the plaintiff for an advance on the security of a lease about to be granted to him by the defendant, the plaintiff inquired of the defendant if he intended to

Defendant
forgetting
facts once
known.

(a) (1887-9) 14 App. Cas. 337.

(b) (1857) 8 E. & B. 647.

(c) (1902) 1 Ch. 610; affirmed *sub. nom. Starkey v. Bank of England*, (1903) A. C. 114; and see *Hambro v. Burnand*,

(1904) W. N. 77, C. A.

(d) (1880) 5 App. Cas. p. 936.

(e) (1860) 1 De G. F. & J. 518; and see *Marnham v. Weaver*, (1899) 80 L. T. 412.

grant it, and the defendant intimated that he did, but there was no contract with the plaintiff that he should grant it. The lease was subsequently granted to A. and mortgaged by him to the plaintiff, but owing to the fact that the defendant had previously granted another lease of the same premises to A., which he had mortgaged to a third party, the plaintiff's security was valueless. The plaintiff sued the defendant for damages to the amount of his advance, and the fact that the defendant had honestly forgotten the circumstance of the first lease was held to be no defence. This doctrine seems to have been based upon the ground that "the plaintiff cannot dive into the secret recesses of the defendant's heart, so as to know whether he did or did not recollect the fact" (a). But it is now well established that in an action of deceit it is essential that the defendant should be conscious of the untruth of his statement at the time of making it (b). No doubt when it can be shown that the defendant had at one time known facts inconsistent with the truth of his statement, there will be strong evidence for the jury that he knew such facts at the time of making the statement and that the statement was consequently fraudulently made, and if such knowledge be shown to be of very recent date the inference of fraud becomes almost irresistible; but the existence of such knowledge at the time of the statement must be found as a fact, mere past knowledge cannot as matter of law be treated as equivalent to fraud.

Defendant becoming aware of untruth after statement made.

In the converse case, where the defendant does not acquire knowledge of the untruth of his statement until after it has been made, but becomes aware of it before the plaintiff has acted upon it, there seems to be no authority needed to show that he is bound to communicate the truth, and will be answerable in damages if he does not (c).

Statement becoming untrue *ex post facto*.

Where the statement complained of was in fact true at the time when made, but, before being acted upon by the party to

(a) *Per* Grant, M.R., *Burrowes v. Lock*, (1805) 10 Ves. p. 476. But see *per* Bowen, L.J., *Angus v. Clifford*, (1891) 2 Ch. p. 471.

(b) See *per* Lord Halsbury, *Derry v. Peek*, (1887-9) 14 App. Cas. p. 343. For exception to this rule, see *Oliver v. Bank of England*, (1902) 1 Ch. 610. In

Low v. Bouverie, (1891) 3 Ch. 82, the case of *Slim v. Croucher* was expressly overruled; but see *Chadwick v. Manning*, (1896) A. C. 231, P. C.

(c) See *per* Lord Blackburn, *Brownlie v. Campbell*, (1880) 5 App. Cas. p. 950.

whom it was made, has been rendered untrue, by reason of a fact coming into existence to the knowledge of the party making it, it seems doubtful whether the non-communication can be made the ground of an action of deceit (a), although in cases in which a contract has been entered into between the parties upon the faith of such representation, the Court will not hold the party to whom the representation was made bound, unless the change of circumstances has been communicated to him (b).

As with the defendant's forgetfulness of facts once known, so with the unreasonableness of the grounds of his belief; though it will not of itself support an action, it will be evidence from which fraud may be inferred. There must be many cases "where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one" (c).

With reference, however, to this non-liability of a person for a false statement carelessly but honestly made, a distinction is to be taken between those cases in which it is sought to make such false statement the foundation of the action, and those in which the action being brought for another cause, it is incidentally sought to estop the defendant from denying the truth of his assertions. Negligence in making a misstatement will suffice to found an estoppel. "But an estoppel is not a cause of action," and the decision in *Derry v. Peek* does not "in any way affect the law relating to estoppel where such law is applicable" (d). Of this principle the case of *Burrowes v. Lock* (e) is an illustration. There one Cartwright assigned to the plaintiff for a price his interest in a fund of which the defendant was trustee. The plaintiff, before fixing the price, had consulted the defendant, who asserted that Cartwright's interest amounted to a certain sum, whereas in fact Cartwright had previously created an incumbrance upon it which reduced it below that sum. The

Fraud not
necessary for
estoppel.

(a) See per Cotton and James, L.JJ., *Arkwright v. Newbold*, (1881) 17 Ch. D. pp. 325, 329.

(b) *Traill v. Baring*, (1864) 4 De G. J. & S. p. 329.

(c) Per Lord Herschell, *Derry v.*

Peek, (1887-9) 14 App. Cas. p. 376.

(d) Per Lindley, L.J., *Low v. Bouverie*, (1891) 3 Ch. p. 101.

(e) (1805) 10 Ves. 470. See the pleadings and decree in this case reported, (1891) 3 Ch. p. 95 (note).

defendant had previously known of this incumbrance, but forgot the circumstance at the time of making the statement to the plaintiff. It was held that to a bill to recover the amount of Cartwright's unincumbered interest the defendant's forgetfulness was no answer, and that he was bound to make his statement good. This decision has, since the case of *Derry v. Peek*, been affirmed and explained to have proceeded upon the ground of estoppel (a).

It appears that it is upon the ground of estoppel alone that the case of *Burrowes v. Lock* can be supported. The ground upon which Lord Herschell in *Derry v. Peek* (b), endeavoured to distinguish *Burrowes v. Lock* from the case before him, namely, that it was a case "where a person, within whose special province it lay to know a particular fact, has given an erroneous answer to an enquiry made with regard to it by a person desirous of ascertaining the fact, for the purpose of determining his conduct accordingly, and has been held bound to make good the assurance he has given," seems to be hardly sufficient, for that is language which is not altogether inapplicable to the case with which he was then dealing, that of a director issuing a prospectus. Nor can the explanation given of that case by Lord Blackburn in *Brownlie v. Campbell* (c), that there was something in the nature of a warranty, be accepted, for there was no evidence of any intention to warrant in that case. While the ground upon which it was explained by Lord Selborne in the same case of *Brownlie v. Campbell*, that the defendant having once had knowledge of the fact denied, could not plead forgetfulness as an excuse for a positive assertion to the contrary, must be regarded as wholly inconsistent with *Derry v. Peek*, and, notwithstanding Lord Herschell's disclaimer of any intention to dissent from Lord Selborne's explanation, must be treated as overruled by it (d).

Where a statement is capable of being understood in more senses than one it is essential to liability that the party making the statement should have intended it to be understood in a sense in which it is untrue. Even though the more natural and reasonable interpretation of the statement made by the defendant

(a) *Low v. Bouvier*, (1891) 3 Ch. 82.

(b) (1887-9) 14 App. Cas. 360.

(c) (1880) 5 App. Cas. 953.

(d) See *per* Lindley, L.J., (1891) 3 Ch. pp. 101-2.

is that put upon it by the plaintiff, and though in the sense in which it is so understood by the plaintiff it is untrue to the knowledge of the defendant, that will not suffice if the defendant did not intend it to be so interpreted, and *à fortiori* this rule applies when the plaintiff did not believe it himself (a). In *Derry v. Peek* (b), an Act incorporating a tramway company provided that the carriages might, with the consent of the Board of Trade, be moved by steam power. The directors, before obtaining such consent, issued a prospectus stating that by their Act they had authority to use steam power, intending thereby to convey that whereas the General Tramways Act, 1870, had divided tramways into two classes, those which might only use animal power and those which might use the power prescribed by the special Act, the tramway in question belonged to the latter class. The Board of Trade refused their consent, whereupon the company was wound up. In an action of deceit brought against the directors by a person who, understanding the prospectus to mean what it said, had bought shares in the company on the faith of it, it was held by the House of Lords, reversing the decision of the Court of Appeal, that the directors, having no intention to deceive, were not liable. Lord Herschell, in delivering his judgment in that case, stated that it was with reluctance that he arrived at the conclusion at which he did, for he thought that "those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact" (c), but he thought that the duty to take care in such matters was only a moral duty. In the following year the law, so far as misrepresentations in prospectuses are concerned, was expressly altered by the Legislature in the Directors' Liability Act, 1890 (d). That statute provides that every director or promoter (e), or other person authorising the issue of

*Derry v.
Peek.*

(a) *Bell v. Marsh*, (1903) 1 Ch. 528, C. A.

(b) (1887-9) 14 App. Cas. 337.

(c) S. C. p. 376.

(d) 53 & 54 Vict. c. 64, s. 3, sub-s. (1).

(e) It is provided by s. 5 of this Act that where two co-promoters of a company join in the issue of a prospectus

containing a wilfully untrue statement, and damages are recovered against one of them, the promoter from whom such damages have been recovered is entitled to contribution from his co-promoter: *Gerson v. Simpson*, (1903) 2 K. B. 197, C. A.

a prospectus of a company, shall be liable for any untrue statement contained in it unless it be proved ; (a) in the case of statements not purporting to be made on the authority of an expert, or of an official person, or of a public official document, that he had reasonable ground to believe and did, up to the time of the allotment of the shares, debentures, or debenture stock, believe that the statement was true ; (b) in the case of statements made on the authority of an expert, that he fairly represented the statement of such expert, provided that even in such event he should none the less be liable if it be proved that he had no reasonable ground for believing that the expert was competent to make the statement ; and (c) in the case of a statement purporting to be made on the authority of an official person, or of a public official document, that it was a fair representation of the statement of such person, or copy or extract of such document. The *onus* of proof as to the reasonableness of the grounds of the defendant's belief in the truth of his statement under (a) would seem to be upon the defendant, that of the unreasonableness of his grounds for believing in the competence of the expert under (b) would seem to be upon the plaintiff (a).

By 63 & 64 Vict. c. 48, s. 10, every prospectus issued by or on behalf of a company or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state : (a) The contents of the memorandum of association ; (b) the number of shares and the remuneration of directors ; (c) the names, descriptions, and addresses of the directors ; (d) the minimum subscription on which the directors may proceed to allotment ; (e) the capital of the company, distinguishing shares and debentures ; (f) the names and addresses of the vendors of any property purchased or acquired by the company ; (g) the amount of the purchase-money, specifying the sum paid for goodwill, and distinguishing cash, shares, and debentures ; (h) the amount of commission payable for subscribing or procuring subscriptions ; (i) the amount of preliminary expenses ; (j) the amount of promotion money ; (k) the dates

(a) An action under this statute, for compensation for loss or damage occasioned by an untrue statement in a prospectus, need not be brought within

two years as provided by the *Civil Procedure Act, 1833* ; *Thomson v. (Lan-)morris*, (1899) 2 Ch. 523.

and particulars of every material contract; (l) the names and addresses of the auditors of the company; and (m) the nature and extent of the interest of every director in the promotion of, or in the property to be acquired by the company (a).

In order to give a cause of action of deceit not only must the statement complained of be untrue to the defendant's knowledge, it must be made with intent to deceive the plaintiff, with intent, that is to say, that it shall be acted upon by him. And it is in some cases a matter of difficulty to determine whether the plaintiff was one of the persons to whom the representation was addressed, and who were intended to act upon it.

Representa-
tion must be
intended to be
acted on by
plaintiff.

"It is now well established that in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally, with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby" (b). Thus, where the defendant advertised a certain farm to be let with immediate possession, knowing that he had no power to let the farm and that it was not to be let, and the plaintiff believing in the *bona fides* of the advertisement and being desirous of becoming tenant of the farm incurred expense in inspecting it, it was held that the representation was sufficiently made to the plaintiff (c).

Representa-
tion need not
be made to
plaintiff
directly.

Reports of joint stock companies, even though nominally addressed only to the shareholders, if in fact intended to be acted on by any persons who are likely to have dealings with the company, are sufficiently addressed to the persons so dealing, to

Reports of
directors.

(a) As to when a director's secret interest in a contract made by a third party with the company automatically vacates his office, see *The Bodega Co. Ltd., In re*, (1904) 1 Ch. 276. And as to illicit contracts by directors generally, see *Laughland v. Millar Laughland & Co.*, (1904) 6 F. 413, Ot. of Sess., and cases noted therein.

botham, (1873) L. R. 8 Q. B. p. 253; cited with approval by Blackburn, J., *Richardson v. Silvester*, (1873) L. R. 9 Q. B. p. 36. *Swift v. Winterbotham* afterwards went to the Exchequer Chamber (see (1873) L. R. 9 Q. B. 301), but the present point was not there discussed.

(c) *Richardson v. Silvester*, (1873) L. R. 9 Q. B. 34.

(b) *Per* Quain, J., *Swift v. Winter-*

entitle them to sue the persons issuing the reports if they are false (a). Thus, where directors of a bank made a false report to the shareholders as to the financial position of the bank, and copies of the report were to be bought by any persons who applied for them, whether shareholders or not, it was held that the directors were liable in damages to a member of the public who, having procured a copy of the report, upon the faith of it bought shares in the bank which shortly afterwards stopped payment (b). So, where the managers of a company with the view of getting a quotation for their shares and thereby defrauding members of the public who should buy such shares fraudulently represented to the committee of the Stock Exchange that two-thirds of their scrip had been paid upon, that being according to the well-known rules of the Stock Exchange a condition precedent to the obtaining of a quotation, it was held that there was sufficient representation to a member of the public, who bought shares upon the faith of the Stock Exchange requirements having been fulfilled, and payments on two-thirds of the scrip having been made (c).

In *Reg. v. Aspinall* (d), where the defendants were indicted for conspiring to falsely represent to the committee of the Stock Exchange that the rules had been complied with, with a view of obtaining a quotation for their shares, and thereby inducing the public to buy such shares, the objection, that the injury to the public was too remote, was taken, and overruled by the Court of Appeal; and after verdict for the Crown, an omission in the indictment to aver an intent to defraud prospective purchasers of shares was held immaterial, since "the natural and probable

(a) As to what constitutes an offer of shares to the public, see *Burrows v. Matabele Gold Reefs & Estates Co., Ltd.*, (1901) 2 Ch. 23; and *Deater v. United Gold Coast Mining Properties, Ltd.*, (1901) W. N. 152.

(b) *Scott v. Dixon*, (1859) 29 L. J. Ex. 62 (n.).

(c) *Bedford v. Bagshaw*, (1859) 4 H. & N. 538. This case was indeed disapproved by Lord Chelmsford in *Peck v. Gurney*, (1873) L. R. 6 H. L. p. 397, upon the ground that, it being

the plaintiff's knowledge of the rules that led him to appropriate the representation to himself, it could not be taken to be made to anyone who was ignorant of the rules, and therefore could not be taken to be made to the plaintiff. But, with submission, it was intended to be made to all members of the public, though as regards those who did not know the rules it would necessarily be ineffectual.

(d) (1876) 2 Q. B. D. 48.

effect of deceiving the committee in the mode alleged would be to injure and deceive purchasers" (a), and an intent to deceive such purchasers ought consequently to be inferred (b).

"Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts and so acting is damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss" (c). But it is essential that there should be an actual intention to deceive the plaintiff or the class to which he belongs; it will not be enough that the misstatement is reasonably calculated to deceive him.

There are indeed *dicta* to be found which suggest the contrary. Thus in *Bedford v. Bagshaw* (d), Pollock, C.B., said: "There must always be evidence that the person charged with the false statement and the fraudulent conduct had in his contemplation the individual making the complaint, or at all events that the individual making the complaint must have been one of those whom he ought to have been aware he was injuring or might injure by what he was doing." That passage was cited in its entirety with approval by Quain, J., in delivering the judgment of the Court in *Swift v. Winterbotham* (e), and in *Barry v. Croskey* (f) Page-Wood, V.-C., stated that he agreed with every word in the Chief Baron's judgment in *Bedford v. Bagshaw*. But neither in *Bedford v. Bagshaw* itself, nor in either of the two above cases in which the terms of Pollock, C.B.'s judgment were approved, was it necessary to hold that anything less than

(a) S. C. at p. 65.

(b) Lord Chelmsford's disapproval of *Bedford v. Bagshaw* was not indeed there referred to, but inasmuch as the majority of the Lords in *Peek v. Gurney* expressed no disapproval of *Bedford v. Bagshaw*, the principle of that decision must be considered to be re-established by the above case of *Reg. v. Aspinall*. At all events the headnote to the Law Report of *Peek v. Gurney* must, in so far as it states that *Bedford v. Bagshaw* is there overruled, be regarded as incorrect. The case of *Salaman v. Warner*, (1891 65 L. T. N. S. 132,

does not in any way impugn the correctness of the decision in *Bedford v. Bagshaw*, for there the contracts entered into by the plaintiff for the sale of shares were made *before* the quotation was granted by the Stock Exchange, and consequently not upon the faith of the Stock Exchange requirements having been complied with.

(c) *Per* Page-Wood, V.-C., *Barry v. Croskey*, (1861) 2 J. & H. p. 23.

(d) (1859) 29 L. J. Ex. p. 65.

(e) (1873) L. R. 8 Q. B. p. 253.

(f) (1861) 2 J. & H. p. 22.

an actual intention to deceive the plaintiff would suffice, there being in each of these cases abundant evidence of such intention. When it is once established that the gist of an action of deceit is intention, it seems clearly to follow that a plaintiff in such an action must prove himself to have been within the contemplation of the defendant either as an individual or as a member of a class. The question indeed seems to be concluded by the decision of the House of Lords in *Peek v. Gurney* (a), where it was held that promoters of a company, who issue a fraudulent prospectus as a prospectus and as nothing more, are not liable for so doing to persons who, not being original allottees of the company's shares, purchase their shares on the market; the reason being that the promoters, having in such case no object in making the false statements except to get the shares taken up, intend to deceive only those who apply for allotments, so that when once the subscription list is full the office of the prospectus is exhausted. But the presumption that a prospectus is not intended to deceive persons other than applicants for allotments is a *prima facie* presumption only; and if the promoters in issuing the prospectus have in fact the additional object of inflating the market price, and of increasing the value of the shares which they have allotted to themselves or their nominees, they will be liable as well to those who purchase from them on the market as to original allottees (b).

The test of intention is interest.

Where a person has acted upon a false representation which was not made directly to him, the practical test whether he was intended to act upon it is whether it was to the defendant's interest that he should do so. Therefore, where persons spread a false rumour for the purpose of raising the price of certain stock, they will not be liable in damages to those who deal with other persons on the faith of such rumour being true (c), there being no intention to deceive any persons other than those who

(a) (1873) L. R. 6 H. L. 377.

(b) *Andrews v. Mockford*, (1896) 1 Q. B. 372. The case of *Gerhard v. Bates*, (1853) 2 E. & B. 476, where a purchaser of shares on the market was held entitled to sue for misstatements in a prospectus, arose on demurrer to a declaration which averred an intent to

deceive the plaintiff, the existence of which intent was necessarily admitted as a fact for the purposes of the demurrer.

(c) *Per* Page-Wood, V.-C., *Barry v. Croskey*, (1861) 2 J. & H. p. 18; *per* Lord Cairns, *Peek v. Gurney*, (1873) L. R. 6 H. L. p. 412.

deal with the defendants themselves, inasmuch as the defendants have nothing to gain by their so doing.

A case which may at first sight present some little difficulty in connection with this subject is the well-known case of *Langridge v. Lery* (a), where the defendant having sold a gun as sound and secure which he knew to be unsafe, was held liable in an action of deceit to the purchaser's son, who was wounded by the bursting of the gun, in spite of the fact that there was no evidence upon which the jury could have found any intention upon the part of the defendant that the representation of safety should be communicated to the son as distinguished from other persons, or any desire that the son should act upon the faith of such representation being true. The defendant's "immediate object must have been to induce the father to buy and pay for the gun. It must have been wholly indifferent to him whether after the sale and payment the gun would be used or not by the son" (b). But the explanation of that case is that, the jury having found a general verdict for the plaintiff, the only question for the Court, on a motion to enter a nonsuit *non obst. vered.*, was as to the sufficiency of the declaration; and the Court upheld the verdict expressly upon the ground that the declaration contained an averment that the gun was sold *for the use* of the purchaser and his sons. The case can hardly be regarded as having decided any principle of general application.

Langridge v. Lery.

This case might, however, well be supported at the present day upon the ground that, the injury to the plaintiff being a physical one, the action would lie without proof of fraud, and consequently it would be unnecessary to show that the plaintiff was intended to act upon the misrepresentation (c).

To entitle a plaintiff to sue for a misrepresentation made to him, it is not enough to show that it was followed by damage to him; he must show that the one was the cause of the other; he must establish that in doing the act whereby he suffered damage he was "*adhibens fidem*" (d), relying upon the representation being true. But, provided the misrepresentation complained of

The plaintiff must have been influenced to some extent by the misrepresentation.

(a) (1837) 2 M. & W. 519.

(b) *Per* Brett, M.R., *Heaven v. Pender*, (1883) 11 Q. B. D. p. 511.

(c) See above, p. 479.

(d) See judgment of Lord Brougham in *Attwood v. Small*, (1835) 6 Cl. & F. pp. 444-9.

Need not have been solely influenced by it.

Carelessness of plaintiff in not discovering the untruth no defence.

Misrepresentation as to credit of third persons.

substantially contributed to deceive the plaintiff, that will be enough; it need not be the sole cause of his deception. Thus, where misrepresentations as to the credit of a third person were made by the defendant to the plaintiff partly in writing and partly not, it was held sufficient to render the defendant liable that the statements in writing were a substantial part of the cause of the deception (a). If the plaintiff's mind was partly influenced by the defendant's misstatements the defendant will not be any the less liable because the plaintiff was also partly influenced by a mistake of his own (b). If the statement complained of is capable of being understood in more than one sense the plaintiff must of course show that he acted upon it in the sense in which it is false (c).

It is no answer to an action for misrepresentation that the plaintiff might have discovered the falsity by the exercise of ordinary care (d). Thus, where a vendor of a public-house was sued in deceit for misrepresentations as to the takings of the business made pending the treaty, the fact that the defendant's books were in the house at the time of the treaty and would have disclosed the real amount of the takings, but the plaintiff neglected to examine them, was held to be no defence (e).

Liability for misrepresentation as to the credit of third persons is to some extent cut down by the operation of 9 Geo. IV., c. 14, by s. 6 of which it is provided that "no action shall be maintained, whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person

(a) *Tatton v. Wade*, (1856) 18 C. B. 371.

(b) See *per* Bowen, L.J., *Edgington v. Fitzmaurice*, (1885) 29 Ch. D. p. 483. See too *Peck v. Derry*, (1887) 37 Ch. D. 541.

(c) See *per* Lindley, L.J., *Smith v. Chadwick*, (1882) 20 Ch. D. p. 80.

(d) See *per* Lord Chelmsford, *Venezuela R. Co. v. Kisch*, (1867) L. R. 2 H. L. p. 120.

(e) *Dobell v. Sterens*, (1825) 3 B. & C. 623; and see *Pilmore v. Hood*, (1838) 5

Bing. N. C. 97, and *Redgrave v. Hurd* (1881) 20 Ch. D. 1. The old case of *Baily v. Merrell*, (1615) 3 Bulst. 95. where the defendant, having fraudulently induced a carrier to carry for him a load of wood upon the representation that it weighed only 800lb. whereas in fact it weighed 2000lb. whereby the carrier's horses broke down. was held not liable on the ground the carrier ought to have weighed the load before attempting to draw it, cannot now be regarded as law.

may obtain money or goods upon (*sic*), unless such representation or assurance be made in writing, signed by the party to be charged therewith."

To satisfy this statute the signature must be the *personal* signature of the party to be charged; that of an agent is insufficient. Therefore, where a father and son were carrying on business in partnership, and the son wrote a letter to the plaintiff containing a fraudulent statement as to the credit of a third person, signing it in the firm name, and subsequently showed it to his father who ratified it, it was held that, notwithstanding the ratification by the father, the signature was not such a signature by the father as to render him liable (*a*).

In another case the signature of the manager of an unincorporated banking company was held not to be a sufficient signature by the company itself, notwithstanding that there was no mode in which the company could sign other than by an agent (*b*). It must follow from that decision that the signature of the manager of an incorporated company will equally be insufficient to satisfy the statute. No doubt in *Barwick v. English Joint Stock Bank* (*c*), the defendants were held liable for a fraudulent misrepresentation as to the credit of a third person signed by their manager, but the point here suggested was not taken. It is submitted that upon this ground that case was wrongly decided. In the later case of *Bishop v. Balkis Consolidated Co.* (*d*), Vaughan Williams, J., held that a representation signed by the secretary of the defendant company could not bind the company, but *Barwick's Case* was not there referred to (*e*). He at the same time expressed an opinion that if the representation had been under the corporate seal, it would have been signed by the company within the meaning of the Act.

What will amount to a representation as to credit is in some

(*a*) *Williams v. Mason*, (1873) 28 L. T. N. S. 232; see too *Hyde v. Johnson*, (1836) 2 Bing. N. C. 776.

(*b*) *Swift v. Jewsbury*, (1874) L. R. 9 Q. B. 301.

(*c*) (1867) L. R. 2 Ex. 259.

(*d*) (1890) 25 Q. B. D. 77. On appeal the Court of Appeal thought that the

particular representation in question in that case was not a representation as to credit, but they expressed no opinion as to whether if it had been the signature of the secretary would have been insufficient.

(*e*) And see *Whitechurch, Ltd. v. Curanagh*, (1902) A. C. 117.

cases not easy to decide. In *Lyde v. Barnard* (a), the Court were equally divided upon the question whether a representation that a life interest in certain trust funds was charged with only a certain specified sum, was a representation concerning the credit or ability of the owner of the life interest. In *Bishop v. Balkis Consolidated Co.* (b) it was held by the Court of Appeal that what is known as a "certification of transfer" of shares in a joint stock company, that is to say a statement made by the company to the effect that the certificate relating to the shares intended to be transferred has been lodged with them by the intending transferor, is not a representation as to credit within the Act.

(a) (1836) 1 M. & W. 101.

(b) (1890) 25 Q. B. D. 512.

Canadian Notes to Chapter XVI.

FRAUD.

STATUTORY LIABILITY OF DIRECTORS.

The Criminal Code of Canada, R. S. C. 1906, c. 146, provides, s. 414, a penalty of five years for issuing or concurring in false statements. This provision is supplemented by various provincial statutes, some of which create a civil and others a criminal liability. The following are some of these provisions :—

Ontario.	<p>R. S. O. 1897, c. 205 (Loan Corporations), s. 118 (5), false statements, &c.</p> <p>R. S. O. 1897, c. 216 (Directors' Liability Act).</p> <p>R. S. O. 1897, c. 217 (Act to Prevent Fraudulent Statements). 7 Edw. VII. c. 34, s. 121.</p>
Alberta and Saskatchewan.	<p>C. O. N. W. T. 1898, c. 61 (Companies), s. 82, fraudulent prospectuses.</p>
Manitoba.	<p>R. S. M. 1902, c. 29 (An Act for the better Prevention of Fraudulent Statements by Companies and others).</p>
Nova Scotia.	<p>R. S. N. S. 1900, c. 128 (Nova Scotia Companies Act), s. 106, false prospectuses.</p>

REPRESENTATION AS TO LOWEST PRICE (a).

Where a commercial traveller falsely represents that there is a combine in existence fixing prices, when, as a matter of fact,

(a) P. 525, *supra*.

his own employers and other concerns have withdrawn from the combine which would have the effect of reducing prices, has the purchaser the right to rescind the order obtained on this misrepresentation? (a)

MISREPRESENTATION BY CONCEALMENT (b).

Fraud may take the form of fraudulent concealment of a defect, **Manitoba.** *e.g.*, of unsoundness in a horse (c).

EXAGGERATED PRAISE (d).

Piano agents are seemingly among the privileged class whose **Ontario.** statements are not to be taken literally (e).

CONDONATION (f).

An agreement ratifying a contract or transfer attacked for **Manitoba.** misrepresentation may itself be held to have been obtained by fraud (g).

REPUDIATION OF CONTRACT OBTAINED BY MISREPRESENTATION (h).

The fact of a person having obtained damages for a misrepresentation under which he entered into an agreement with the other will not necessarily rescind the contract. Thus in one case a landlord had represented a farm as "clean" when it was not clean; but the tenant had entered and kept possession, and sued for and obtained damages for the misrepresentation. Held, that the landlord was entitled to the rent (i).

PAYMENTS AFTER FINDING OUT (k).

Where the purchaser, on discovering the article is not as **Ontario.** represented, does not disaffirm a contract or offer to return the article, but treats the contract as subsisting, he cannot recover for misrepresentation (l).

(a) Decided in the affirmative in the Quebec case, *Letellier v. Lafortune*, Q. R. 26 S. C. 260.

(b) See p. 526, *supra*.

(c) *Budd v. McLaughlin*, 10 M. L. R. 75; *Derry v. Peek*, 14 App. Cas. 337; and *Redgrave v. Hurd*, 20 Ch. D. 1, followed.

(d) P. 526, *supra*.

(e) See *Frye v. Milligan*, 10 O. R.

599.

(f) P. 527, *supra*.

(g) See *Atkinson v. Borland*, 14 Man. L. R. 205.

(h) P. 527, *supra*.

(i) *Johnstone v. Hall*, 10 M. L. R. 161.

(k) P. 527, *supra*.

(l) *Frye v. Milligan*, 10 O. R. 509, sale of piano on instalment note plan.

SECRET COMMISSION (a).

Nova
Scotia.

A secret commission frequently takes the form of an option to sell to the guilty party for a lesser sum and a private agreement to pay over to him the difference between that lesser sum and the greater sum for which he unloads on the real purchaser. Such a transaction is considered less in the sense of an option than an arrangement to enable the go-between to commit a fraud (b). Where the position of the parties cannot be restored, the agreement will not be rescinded in favour of the real purchaser, but the difference pocketed by the go-between will be the measure of damages against the *vendor* (c).

NOT CARING WHETHER IT WAS TRUE OR FALSE (d).

Ontario.

White v. Sage (e) seems to point to a different result to the English decisions. In this case there was a finding of the jury that the defendant made the representation without knowing whether it was true or false, without a reasonable belief in its truth, and without making proper inquiries. But they also answered in the negative, "Did the defendant falsely, fraudulently, and deceitfully represent the signature to the cheque to be genuine when in truth and in fact it was a forgery?" The action was held not maintainable. The case is perhaps less illustrative of the law of misrepresentation than of the art of eliciting unexpected answers from a jury.

UNTRUE *EX POST FACTO* (f).

Nova
Scotia.

There is a distinction between a statement becoming untrue *ex post facto* and being proved untrue by events *ex post facto*. Thus, where a representation that a mare was in foal was proved by the event to be untrue, the defendant, having knowingly made the misrepresentation, was held liable (g).

REPRESENTATION MUST BE INTENDED TO BE
ACTED ON (h).

Nova
Scotia.

Misrepresentations made subsequently to the contract, and having no influence in inducing the making thereof, are not sufficient to set aside the contract (i).

(a) P. 532, *supra*.

(b) See *Northrup Mining Co. v. Dimock*, 27 N. S. R. 112, *per* Townshend, J.

(c) *Ibid*.

(d) P. 533, *supra*.

(e) 19 A. R. 135.

(f) P. 536, *supra*.

(g) *Fraser v. McLanders*, 25 N. S. R. 542.

(h) P. 541, *supra*.

(i) *McNaughton v. Hudson*, 37 N. S. R. 191.

REPORTS OF DIRECTORS (a).

An action arising out of fraudulent statements in the annual reports of a company may lie directly against the company (b), unless the purchaser of its shares bought from a private holder (c). Ontario.

TEST OF INTEREST (d).

Where the promoters of a company benefited by the misrepresentation of an agent (as to the number of shares taken up) by receiving the payment of the subscriber, it was held that they were liable to repay the same though they did not authorize, and had no knowledge of, the false representations of their agent (e). Canada.

It is not necessary to show that the person practising the deceit has benefited thereby, provided he made the representation knowing it to be untrue (f), and with the intention of inducing the party to whom it is made to act upon it (g), and the latter does act upon it and sustains damage in consequence (h). Ontario.

PLAINTIFF MUST HAVE BEEN INFLUENCED (i).

Where the bargain has been concluded and no tendency to recede from it has been shown prior to the representations, they cannot be taken as having any influence in inducing the contract (k). Nova Scotia.

MISREPRESENTATION AS TO CREDIT OF THIRD PERSON (l).

Sect. 6 of 9 Geo. IV. c. 14, has been expressly inserted in the statutes of some of the Provinces, viz. :—

R. S. O. 1897, c. 146, s. 7 (see also s. 8). Ontario.

R. S. B. C. 1897, c. 85 (Statute of Frauds), s. 12. British Columbia.

C. S. N. B. 1903, c. 140 (Statute of Frauds), s. 5. New Brunswick.

R. S. N. S. 1900, c. 141 (Statute of Frauds), s. 10. Nova Scotia.

(a) P. 541, *supra*.

(b) *Moore v. Ontario Investment Assn.*, 16 O. R. 269.

(c) *Ibid*.

(d) P. 544, *supra*.

(e) *Milburn v. Wilson* (2 O. L. R. 261), 31 S. C. R. 481. *Per* Strong, C.J., that neither express authority nor subsequent ratification or participation in benefit were necessary to make the promoters liable; the rule of *respondeat superior* applies as in other cases of agency.

(f) *French v. Skead*, 24 Gr. 179.

(g) Cf. *Petrie v. Guelph Lumber Co.*, 2 O. R. 218; 11 A. R. 336; 11 S. C. R. 450, distinction between legal and moral fraud; *White v. Sage*, 19 A. R. 135; *Royal Ins. Co. v. Byers*, 9 O. R. 120.

(h) Cf. *Garland v. Thompson*, 9 O. R. 376.

(i) P. 545, *supra*.

(k) *McNaughton v. Hudson*, 37 N. S. R. 191.

(l) P. 546, *supra*.

CHAPTER XVII.

DEFAMATION.

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Right of reputation.

Action of defamation.

Slander.

Libel.

Falsehood and malice.

THE right of each man, during his lifetime (a), to the unimpaired possession of his reputation and good name is recognised by the law. Reputation depends on opinion, and opinion in the main on the communication of thought and information from one man to another. He therefore who directly communicates to the mind of another matter untrue and likely in the natural course of things substantially to disparage the reputation of a third person is, on the face of it, guilty of a legal wrong, for which the remedy is an action of defamation—a remedy, however, by no means commensurate with the damage that in every case may arise, but limited by many considerations of convenience and public policy. Defamatory matter may have no existence except as it is communicated or published in some fugitive manner. Such defamation is called slander. Or it may be embodied in some permanent form, and in such case, its production will be one thing, its publication another. Defamation of this kind is called libel.

Primâ facie the publication of defamatory matter is a cause of action. It is true that it is necessary for the plaintiff in his pleading to allege that the imputation published is false, and usual, though not necessary (b), to allege that it is malicious;

(a) Action is not maintainable for a slander on a deceased person (*Broom v. Ritchie*, (1904) 6 F. 842, Ct. of Sess.).

(b) *Per Cur.*, *Bromage v. Prosser*, (1825) 4 B. & C. p. 255. And see *Ray. v. Munslow*, (1895) 1 Q. B. 758.

but the burden of proof of neither of these allegations lies upon him. It is not to be assumed that any one is of bad character, and therefore defamation of an individual may be taken to be false until it is proved to be true. As for the word malicious its meaning simply is that the publication was intentional and without just cause or excuse (a). Defamation must be wilful in the same way as all torts of commission must be. The existence of just cause or excuse is for the defendant to establish either out of the mouth of the adverse witnesses or by independent proof. What constitutes such just cause or excuse remains to be considered later on. At present it is necessary to consider more fully what libel is, what slander is, and what amounts to a publication.

Defamation must be wilful.

The term libel of course properly indicates something printed or written, but it includes also any scandalous painting, effigy, or emblem. A gallows at the doorway of some obnoxious person may be a libel upon him (b).

What is a libel.

A man may be libelled in respect either of his personal character, or of his office or vocation. In the former case the libel must consist of matter calculated to hold him up to "hatred, contempt, or ridicule" (c). Whether it does so or not depends, not upon the intention of the offending party, but upon the probabilities of the case, upon the natural tendency of the publication, having regard to surrounding circumstances (d). If a defendant has published "what he knew, or ought to have known, was calculated to injure the plaintiff, he must . . . be responsible for the consequences though his object might have been to injure another person than the plaintiff, or though he may have written in levity only. . . . No one can cast about firebrands and death and then escape from being responsible by saying that he was in sport" (e). On the other hand, the mere

Does not depend on intention.

Language not in itself defamatory.

(a) *Per Cur.*, *Bromage v. Prosser*, (1825) 4 B. & C. p. 255.

(b) 5 Rep. 126; *Carr v. Hood*, (1808) 1 Camp. 355, n. See *Eyre v. Garlick*, (1878) 42 J. P. 68. In *Jefferies v. Duncombe*, (1809) 11 East, 227, the plaintiff recovered damages against the defendant for keeping in front of the plaintiff's house a lamp burning during the daytime, "thereby intending to mark out the dwelling-house of the

plaintiff as a bawdy house." The action is described in the report as one of nuisance. It would seem, however, in substance an action of libel. And see *Monson v. Tussauds, Ltd.*, (1894) 1 Q. B. 671.

(c) *Per Parke, B.*, *Parmiter v. Coupland*, (1840) 6 M. & W. p. 108.

(d) *Haire v. Wilson*, (1829) 9 B. & C. 643.

(e) *Per Lord Blackburn*, *Capital &*

intention to vex and annoy will not make language defamatory which is not so in its own nature (a). An imputation of conduct not in itself really censurable, however distasteful or objectionable the conduct may be according to the notions of certain people, is not a legal injury. "Would it be libellous," it has been asked, "to write of a lady of fashion, that she had been seen on the top of an omnibus, or of a nobleman that he was in the habit of burning tallow candles?" (b). "There is a distinction between imputing what is merely a breach of professional etiquette and what is illegal, mischievous, or sinful; between, in fact, matters of taste and matters of crime" (c). Thus it has been decided that in humble life the mere imputation of "want of womanly delicacy" is not actionable *per se* (d). Nor is it a libel to write of a medical man that he met homœopathists in consultation. A homœopathist may be a perfectly competent and qualified practitioner, and the imputation therefore was not of professional misconduct but simply of a breach of an arbitrary rule. In *Mawe v. Pigott* (e), the plaintiff had been attacked in the defendant's newspaper for certain denunciations of the Fenian conspirators which he was said to have made, and it was argued that he was exposed to hatred and contempt in the opinion of many people, by being represented as an informer or prosecutor or otherwise aiding in the detection of crime. "That is quite true," says the judgment, "but we cannot be called upon to adopt that standard. The very circumstance which will make a person be regarded with disfavour by the criminal classes will raise his character in the estimation of right-thinking men. We can only regard the estimation in which a man is held by society generally" (f). To seriously depart from the accepted rules of right-feeling, good conduct, and prudence is either hateful or

Counties Bank v. Henty, (1880-2) 7 App. Cas. p. 772. In a case of criminal libel it is advisable, though not apparently essential, to insert an averment in the indictment that the publication was "to the manifest corruption of the morals of his Majesty's subjects," *Rex v. Barraclough*, (1905) 22 T. L. R. 41, C. C. R.

(a) The case of *Nevill v. Fine Arts, &c., Insurance Co.*, (1895) 2 Q. B. 156,

as to which see below, p. 565, is perhaps difficult to reconcile with the earlier authorities.

(b) *Per* Pollock, C.B., *Clay v. Roberts*, (1863) 8 L. T. N. S. p. 398.

(c) *Per* Pollock, C.B., *ibid.*

(d) *A. B. v. Blackwood*, (1902) 5 F. 25, Ct. of Sess.

(e) (1869) Ir. Rep. 4 C. L. 54.

(f) *Ibid.* p. 62. See too *Miller v. David*, (1874) L. R. 9 C. P. 118.

contemptible. It is therefore libellous to impute ingratitude, hardheartedness, or insolence (*a*). But ridicule may be incurred through accidental circumstances, without any suggestion of moral blame. To apply a ludicrous nickname or to narrate an anecdote of which the hero cuts an absurd figure may constitute a libel (*b*). A mere statement that a person was suspected of crime, without any imputation of actual guilt, may be libellous (*c*), and an allegation that a person has brought a blackmailing suit, is actionable without proof of special damage (*d*). But it does not exceed the bounds of "fair comment," and is consequently not actionable *per se* for a dramatic critic to say that a play is vulgar and contains "a good deal of sorry stuff" (*e*).

There is apparently nothing defamatory in an imputation of insanity, and therefore it may be doubted whether such an imputation would be actionable, where not made with reference to a person in a particular office or calling, for insanity is rather a subject of pity than of any harsher feeling (*f*). No substantial distinction can be drawn between an imputation of mental disease and one of bodily disease. In *Rex v. Harvey* (*g*), where the defendant was convicted of libel for imputing to the King that he was insane, Abbott, C.J., directed the jury that "to assert falsely of his Majesty or of any other person that he labours under the affliction of mental derangement is a criminal act." But the conviction in that case is probably to be justified upon the ground that insanity would unfit the King for his office, or upon grounds which would be inapplicable in the case of a similar imputation upon a subject. Again, there is nothing defamatory *per se* in an imputation of insolvency, for a man may lose his money by pure misfortune. And, therefore, presumably no action will lie

Imputation

Imputation
of insolvency.

(*a*) *Cor v. Lee*, (1869) L. R. 4 Ex. 284; *Churchill v. Hunt*, (1819) 2 B. & Ald. 685; *Clement v. Chivis*, (1829) 9 B. & C. 172.

(*b*) *Cook v. Ward*, (1830) 6 Bing. 409.

(*c*) *Monson v. Tussauds, Limited*, (1894) 1 Q. B. 671.

(*d*) *Marks v. Samuel*, (1904) 2 K. B. 287, C. A.

(*e*) *McQuire v. Western Morning News*, (1903) 2 K. B. 100, C. A.

(*f*) *Morgan v. Lingen*, (1863) 8 L. T.

N. S. 800.

(*g*) (1823) 2 B. & C. 257. In *Weldon v. Winslow* (Times, 1884, March 14, *et seq.*), the plaintiff sued a medical man for falsely alleging that she was insane. But, the judge having withdrawn the case from the jury on the ground that the statement was privileged, it became unnecessary to discuss the question whether the imputation was defamatory.

for writing of a non-trader that he is insolvent, without more (a). A statement that a solicitor had been "cleaned out and lost his all" has, however, been held actionable (b). Ordinarily to support such an action the plaintiff must, however, it is apprehended, lay an innuendo that the insolvency was imputed to have been caused by circumstances discreditable to him.

Libel on a man in his calling

If a libel is pointed against a man with special reference to his calling or office, the limits of defamation appear to be wider (c). The words need not be provocative of hatred, ridicule, or contempt; it is sufficient if their tendency is injurious (d). An imputation of insanity is necessarily injurious to any person in his calling, and therefore defamatory if used with reference to such calling (e). Similarly, an imputation of insolvency is actionable if made against a trader (f).

Where calling no longer followed.

No one can be libelled in respect of an office which he has ceased to fill or a vocation which he has ceased to follow, but imputations against a man in some particular relation may also affect him in his general character. If it be alleged of a retired solicitor that he was guilty of sharp practice in his profession, he is not libelled as a solicitor, for he is no longer one, but he is libelled as a man, for he is accused of dishonesty (g). But if the imputation be that he was unskilful in his profession, then it may be questioned whether from any point of view the language is actionable.

Joint injury.

Where several persons are joined in some capacity they may be jointly defamed in that capacity and have a joint action for the joint injury. Thus, trading partners may recover for a libel on their solvency in respect of the damage done to their firm (h), and each individual has a separate right of action for such separate damage as he may have sustained (i). So a trading corporation

(a) Nearly all the cases to be found in the books in which a mere imputation of insolvency has been held actionable are cases in which the plaintiff was a trader.

(b) *A. B. v. C. D.*, (1904) 7 F. 22 Ct. of Sess.

(c) Defamation of this kind is more fully considered below, pp. 557 *sqq.*

(d) *Per* Lord Blackburn, *Capital & Counties Bank v. Henty*, (1880-2) 7

App. Cas. p. 771.

(e) *Morgan v. Lingen*, (1863) 8 L. T. N. S. 800.

(f) *Read v. Hudson*, (1700) 1 Lord Raym. 610.

(g) *Per* Parke, J., *Boydell v. Jones*, (1838) 4 M. & W. p. 450.

(h) *Forster v. Lawson*, (1826) 3 Bing. 452.

(i) *Robinson v. Marchant*, (1845) 7 Q. B. 918.

may sue in its corporate capacity for a libel disparaging its goods (a), or imputing insolvency (b) or any other matter calculated to injure it in the way of its business (c). But it is apprehended that a municipal or other non-trading corporation cannot sue for a libel in its corporate capacity, whatever the nature of the imputation may be. In the case of such a corporation any charge of misconduct must be treated as directed against the corporators as individuals (d). And where several persons, though exercising an office jointly, have no joint interest to be damaged, a libel on them in their collective capacity is not a joint injury but a several injury to each of them. In *Booth v. Briscoe* (e) the defendant had libelled "the trustees" of a certain charity. The several trustees joined in one action against him, and though it was assumed (f) that such joinder was permissible, it was held that each plaintiff had a separate cause of action and the damages of each ought to have been separately assessed.

To attack the reputation of a thing may be to attack the reputation of a person. An unfavourable review of a book may be a libel on the author, although he be not directly referred to, though in such case in order to become actionable it must be shown that the unfavourable review exceeded the bounds of fair comment. To allege of a tradesman that he habitually sells worthless goods is an impeachment of the vendor as well as of what he sells, and is necessarily defamatory because injurious to him in his trade. But it is not defamatory to assert that a particular article which he has in stock is worthless (g). A statement that a certain ship is unseaworthy is directed against the character of the ship, not against the character of the owner, but if it be added that this unseaworthy vessel is advertised for carrying passengers, the statement becomes defamatory, for it involves almost necessarily a charge of misconduct or mismanagement (h).

Libel on thing may be libel on person.

(a) *British Empire Type Setting Co. v. Linotype Co.*, (1898) 79 L. T. 8.

(b) *Metropolitan Saloon Omnibus Co. v. Hawkins*, (1859) 4 H. & N. 87.

(c) *South Hetton Coal Co. v. North-Eastern News Association*, (1894) 1 Q. B. 133; *Thorley's Cattle Food Co. v. Massam*, (1880) 14 Ch. D. 763.

(d) *Mayor, &c., of Manchester v. Williams*, (1891) 1 Q. B. 94.

(e) (1877) 2 Q. B. D. 496.

(f) But see *Smurthwaite v. Hannay*, (1894) A. C. 494.

(g) *Erans v. Harlow*, (1844) 5 Q. B. 624.

(h) *Ingram v. Lawson*, (1840) 6 Bing.

Slander.

Slander is defamation communicated by spoken words, or other sounds (*a*), or by gestures (*b*). The law recognises a distinction between libel and slander, not, perhaps, resting on any satisfactory principle (*c*), but convenient as tending to restrain the multiplicity of actions. Slander directed against general character must, in order to be actionable, be defamatory in the same sense as a libel must be, and in addition must either impute a criminal offence, or some disease tending to exclude the party defamed from society, or, in the case of a woman, unchastity, or must have caused special damage. Slander directed against a man in his office or calling stands on the same footing as libel.

Imputing criminal offence.

1. The imputation of a criminal offence must be direct. Words of mere suspicion are not enough in themselves. It will be necessary for the plaintiff to satisfy the jury that under the circumstances such words were equivalent to an absolute affirmation of guilt (*d*). The exact offence need not be specified; words involving a general charge of criminality will suffice. Thus, "You have committed an act for which I can transport you,"

Offence need not be indictable.

has been held an actionable expression (*e*). It is not necessary that the offence charged should be indictable, although such a notion has been widely prevalent and has found its way into the text books, probably from the fact that, by the common law, indictment was the almost universal method of procedure in criminal matters (*f*). Whether it is a slander to impute an offence punishable by fine only may be doubted. In the United

Extraditable offence.

N. C. 212. So in *Burnet v. Wells*, (1700) 12 Mod. 420, it was held clearly actionable to say of a tradesman in the way of his trade, "He hath nothing but rotten goods in his shop." But it was agreed that if the words were that he had rotten goods no action would lie. In *Watkin v. Hall*, (1868) L. R. 3 Q. B. p. 299, Blackburn, J., says that it is actionable to say of a cattle dealer that he has disease among his cattle. But this seems doubtful. See too *Thorley's Cattle Food Co. v. Massam*, (1880) 14 Ch. D. 763; *Thomas v. Williams*, (1880) 14 Ch. D. 864. An action may lie for the malicious disparagement of a thing, causing special damage; but this stands

on a different footing, see Ch. XVIII.

(*a*) The malicious hissing of an actor is a slander of him in the way of his profession: *Gregory v. Brunswick*, (1844) 6 M. & G. p. 959.

(*b*) *Per* Lord Abinger, *Mathers*, (1836), 1 M. & W.

(*c*) *Per Cur.*, *Thorley v. .* (1812) 4 Taunt. pp. 364-5.

(*d*) *Tozer v. Mashford*, (1853) 539; *Simmons v. Mitchell*, 1 App. Cas. 156.

(*e*) *Curtis v. Curtis*, (1834) 10 477; see too *Francis v. Rouse*, (1834) 1 M. & W. 191.

(*f*) *Webb v. Bearan*, (1883) 11 Q. B. D. 609.

States it is held to be actionable to impute a crime committed out of the jurisdiction (a). The point does not appear to have arisen in England. Inasmuch as the ground on which an action is allowed for words imputing crime is that the slandered party may be thereby put in peril, the true principle would seem to be that if the alleged offence is of the class for which the party would be liable to extradition an action would lie, but if otherwise, not.

2. It has been said that the mere imputation of a contagious distemper is actionable "because all prudent persons will avoid the company of a person having such a distemper," and that it makes no difference whether the distemper be owing to the visitation of God, to accident, or to the indiscretion of the party therewith afflicted (b). This, however, appears not to be correct. No action lies where the words impute a mere ordinary infectious or contagious disease (c), and the rule for practical purposes may be taken to be that it is actionable to say of another that he has a venereal disease (d). Why this should be so is not quite clear. It cannot be because of the moral stigma, for it is not actionable to impute a past disease (e). To say of a man that he is a leper has been held actionable (f), but for this a good reason may be given, as leprosy at one time involved a loss of civil *status*.

Imputing
disease.

3. If the speaking of any defamatory words causes special damage there is a good cause of action, not merely for the special damage, but for the defamation (g). The authorities are to a certain extent in conflict, but the better opinion seems to be that although mere words are not as a general rule regarded by the law, yet when their power for mischief has once been shown by the fact that they have caused actual damage they acquire an actionable quality, and general damage may be recovered in respect of them just as if they had been deliberately published in writing. The case of *Dixon v. Smith* (h)

Causing
special
damage.

General
damage may
be recovered.

(a) Townsend on Slander and Libel, 4th Ed. § 159.

(b) Bac. Ab. Slander, B. 2. See too *per* Blackburn, J., *Watkin v. Hall*, (1868) L. R. 3 Q. B. p. 399.

(c) *James v. Rutleah*, (1599) 4 Rep. 17; *Grimes v. Lovel*, (1698) 12 Mod. 242.

(d) *Bloodworth v. Gray*, (1844) 7

M. & G. 334.

(e) *Carslake v. Mapledoram*, (1788) 2 T. R. 473.

(f) *Taylor v. Perkins*, (1606) Cro. Jac. 244.

(g) *Allcott v. Millar's Karri & Jarrah Forests*, (1905) 91 L. T. 722, C. A.

(h) (1860) 5 H. & N. 450; 29 L. J. Ex. 125.

slander any office or employment of temporal profit. Platt, B., however (a), expressed his doubts, on the ground that the plaintiff, though unbeneficed, had a *status* which might be imperilled by the slander. "If the slander had been of a barrister imputing to him such misconduct as would justify his being disbarred, it might be a good cause of action against the slanderer, though the slandered person never held a brief." It certainly would seem that if a man habitually follows a calling he ought not, simply because he temporarily fails of employment, to be deprived of a protection which may be of far more importance to him than to one who holds a position firmly established (b). The effect of the Clergy Discipline Act, 1892 (c), is practically to overrule the decision in *Galwey v. Marshall*, immorality (if proved) being not only a ground for eviction from a living in possession, but also, in the absence of the Royal pardon, a bar to any future preferment.

Slander must be directed to calling or office.

Imputation on general character.

The language complained of must touch the plaintiff in his calling or office, it must not simply tend to his injury. In *Doyley v. Roberts* (d), the plaintiff, an attorney, was said to have "defrauded his creditors and been horsewhipped off the course at Doncaster." The jury found that the words "were not spoken of the plaintiff in his business as an attorney," but "that they had a tendency to injure him morally and professionally," and it was held that no action would lie (e). In another case the rule is laid down in language which has been frequently quoted. "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business" (f). The meaning, however, of the passage is not quite clear. To impute the lack of some general requisite is not enough by itself. It is not actionable to impute dishonest con-

(a) *Ibid.* p. 301.

(b) In *Jones v. Sterens*, (1822) 11 Price, 235, the plaintiff sued for a libel on himself "in the way of his profession and business of attorney." He was on the rolls, but had not taken out a certificate, and it was held that he still retained his professional character and could be libelled in that character.

(c) 55 & 56 Vict. c. 32.

(d) (1837) 3 Bing. N. C. 835.

(e) In view of the recent case of *A. B. v. C. D.*, (1904) 7 F. 22, Ct. of Sess., the accuracy of this decision at the present day is open to question.

(f) *Per Cur.*, *Lumby v. Allday*. (1831) 1 C. & J. p. 305.

duct to a solicitor, unless in the way of his profession (a). So, to say of a trader that he is a regular prover under bankruptcy no doubt involves a charge of very dishonest conduct, but not necessarily a charge of dishonesty in the way of his trade (b). On the other hand the mere fact that, on the face of the words in question, the defamation is connected with the plaintiff's calling will not make them actionable. The connection must exist according to the reason of the matter, not simply in the mind of the defendant (c). The rule may, perhaps, be said to be that the imputation must necessarily, according to the minds of all reasonable people, be injurious to the plaintiff in his trade, profession, or office, and that, in order to do so, it must be necessarily connected with that profession, trade, or office, either by reason of the very nature of the charge or of the particular facts of the case. Thus, if a man is a trader, or engaged in a profession which involves the handling of money (d), words imputing insolvency are *per se* actionable, because they are necessarily defamatory of him in his trade (e) or vocation. But although defamation of a man in the way of his trade is actionable, mere depreciation of the goods in which he deals, although amounting to unfavourable comparison with those of a rival firm, will not *per se* sustain legal proceedings, unless there is proof of special damage (f), it being necessary, apart from such proof, in order to disclose reasonable cause of action in such case, for the plaintiff to show that the statement is not only commercially prejudicial to him, but that it is also *prima facie* unlawful (g). And whether in any given case the words complained of are susceptible of a defamatory meaning, or are merely a disparagement of the goods, is for the jury (h). Again, it is not actionable to impute adultery to a physician unless the charge also involves a breach of professional confidence (i). A

Imputing
insolvency to
trader.

(a) *Doyley v. Roberts*, *supra*, p. 559 ; and see *Dauncey v. Holloway*, (1901) 2 K. B. 4.

(b) *Angle v. Alexander*, (1830) 7 Bing. 119.

(c) See *Lumby v. Allday*, (1831) 1 C. & J. 301 ; *Hopwood v. Thorn*, (1849) 8 C. B. 293.

(d) *A. B. v. C. D.* (1904) 7 F. 22 Ct. of Sess.

O.T.

(e) *Brown v. Smith*, (1853) 13 C. B. 596 ; *Jones v. Littler*, (1841) 7 M. & W. 423.

(f) *Allcott v. Millar's Karri & Jarrah Forests, Ltd.*, (1905) 91 L. T. 722, C. A.

(g) *Hubbuck & Sons v. Wilkinson & Others*, (1899) 1 Q. B. 86, C. A.

(h) *Linotype Co. v. British Empire Type Setting Co.*, (1899) 81 L. T. 331.

(i) *Ayre v. Craven*, (1834) 2 A. & E. 2.

man may be very immoral, and yet a very capable physician; and though the charge might tend to his professional injury, it would not of necessity do so. It might affect one class of practice and not another. It is obvious that if the mere possible tendency of words were adopted as a test of their actionable character, any one following a respectable employment might have his action for words reflecting on his general respectability. It might be supposed, however, that in the case of any calling for which, according to the ordinary notions of society, a high moral character is requisite, the imputation of any serious breach of the moral law would be actionable. The contrary, however, has been maintained. "Some of the cases," says Lord Denman, "have proceeded to a length which can hardly fail to excite surprise, a clergyman having failed to obtain redress for the imputation of adultery, and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution" (a). It has, however, since been laid down (b) that the imputation on any beneficed clergyman of an offence rendering him liable to deprivation is actionable. Incontinence, drunkenness after monition, gross scandal, heinous crime—in short, all notorious offences and enormous sins, are grounds of deprivation (c), and, therefore, words imputing them, it would seem, are actionable. But where the plaintiff, a beneficed clergyman, was accused, first, of having cheated with regard to his clerical salary, and secondly, of having cheated generally, the first charge was held actionable and the second not (d).

Misconduct of clergyman.

Language not defamatory on the face of it.

Hitherto the endeavour has been to define what is actionable language, on the assumption that the meaning conveyed by that language is undoubted. This, however, is by no means always the case, and where the words do not speak for themselves, the plaintiff must be prepared to put the necessary gloss or innuendo upon them. They may be wholly or in part foreign, technical, or slang, and if so, they must be properly translated by suitable expert evidence into plain English. There are many doubtful

Innuendo; meaning of individual words.

(a) *Ayre v. Craven*, (1834) 2 A. & E. p. 7.

(b) *Galwey v. Marshall*, (1853) 9 Ex. 294.

(c) *Ayliffe's Parergon*, pp. 208–9.

(d) *Pemberton v. Cills*, (1847) 10 Q. B. 461. In *Warr v. Jolly*, (1834) 6 C. & P. 497, Alderson, B., treated spoken words imputing intemperance to a dissenting minister as actionable.

words, which have crept into more or less general use, but have not yet obtained full recognition or become universally intelligible. With regard to these, it is in each instance for the Court to say whether it will attach a meaning itself, or whether it will take the opinion of those to whom the expression in question is familiar (a). A more liberal view is now taken than formerly of the extent of judicial knowledge of general facts and usages, and judges do not consider it necessary when on the bench to be ignorant of the various matters which, as men of the world, they know (b). In the same way historical and literary allusions, allegorical and figurative expressions, when they have passed so far into ordinary use that they may be taken to be intelligible to any person of fair sense and education, may be taken also to be intelligible to the Court and jury (c). But when the meaning of each individual term in the matter alleged to be defamatory is known, the question then remains, what is the construction of the whole, and whether it bears a defamatory meaning. It has, however, been held (d) that even where a plaintiff fails in establishing the innuendo, he is nevertheless entitled to damages awarded by a jury who find the words libellous *per se*.

Customary limitations on ignorance of Court.

Meaning of language as a whole.

Where, however, the words uttered are not slanderous *per se*, and the result of their utterance was not one that could, with any degree of probability, have been within the contemplation of the defendant when he uttered them, even if special damage results, he will not in every case be held liable (e).

In the last century, according to the great preponderance of authority (f), the meaning of a libel, as the meaning of every other document, was to be decided by the Court. However, by 32 Geo. III. c. 60, s. 1, it is provided that in indictments and informations for libel the jury may "give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed . . . to find the defendant or defendants guilty merely upon the

Libel or no libel, formerly question for judge.
Fox's Act.

(a) *Barnett v. Allen*, (1858) 3 H. & N. 376.

(d) *Fisher v. Nation Newspaper Co.*, (1901) 2 Ir. R. 465.

(b) See *Ryder v. Wombwell*, (1868) L. R. 4 Ex. 32; *per Brett, J.A., Reg. v. Aspinall*, (1876) 2 Q. B. D. pp. 61-2.

(e) *Speake v. Hughes*, (1904) 1 K. B. 138, C. A.

(c) *Hoare v. Silverlock*, (1848) 12 Q. B. 625.

(f) See *Rex v. Shipley*, (1784) 4 Doug. 73.

Judge still to
decide as to
evidence of
libel.

How language
construed.

As a whole.

Natural and
obvious sense.

proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." Although this statute only applies to criminal proceedings, it has been followed, by analogy, in actions for libel, and no plaintiff can succeed unless he satisfies the jury that the publication sued on is defamatory. He must, also, of course, satisfy the judge that there is evidence, fit for their consideration, that is defamatory (a). In every case the evidence of the character of the alleged libel or slander will consist in the first place of the words themselves, in the second, of the surrounding facts and circumstances; and the inquiry will also be twofold: first, as to the natural meaning of the words on the face of them; secondly, as to the modification of that meaning by the remaining evidence. Thus, although it is not in itself *ex facie* libellous for a false birth notice to appear in a newspaper, the appearance of such notice within two months of the date of marriage is defamatory as imputing immorality to the plaintiff (b). In construing the language of an alleged libel, two rules are to be observed. First of all, the whole matter is to be taken into account. The plaintiff is not permitted to pick out this or that sentence which he may consider defamatory, for there may be other passages which will take away their sting. Bane and antidote may be found together; and it is for the jury to say whether, taking the publication as a whole, it is injurious to the plaintiff (c). Secondly, "words are to be taken in the sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them" (d). This rule, which was laid down as long ago as the time of Lord Macclesfield, was very imperfectly observed for the rest of the century, and it is only in comparatively recent times that the perverse subtlety of special pleading by which this branch of the law was especially encumbered has altogether disappeared.

Every communication said to be defamatory may be

(a) See below, p. 568.

(b) *Morrison v. Ritohie*, (1902) 4 F. 645, Ct. of Sess.

(c) *Chalmers v. Payne*, (1835) 2 C. M. & R. 156.

(d) *Per Cur.*, *Harrison v. Thornborough*, (1713) 10 Mod. p. 198; see *Hankinson v. Bilby*, (1847) 16 M. & W. 442; *Roberts v. Camden*, (1807) 9 East. 93.

(a) defamatory on the face of it; (b) ambiguous; or (c) innocent on the face of it.

(a) Language is defamatory on the face of it either when the defamatory meaning is the only possible meaning, or when it is the only natural and obvious meaning. If A. says that B. has taken, stolen, and carried away the goods of C., his only possible meaning is that B. has committed the offence of larceny. But if he says that B. has robbed C., his only natural and obvious meaning is the same. It is, indeed, possible to suggest that A. by the word "robbed" may merely have intended to suggest that B. had acted unfairly by C. in some pecuniary matter, but if so, it is for him to prove it. The words by themselves give a good cause of action for slander as imputing a crime (a).

Language
prima facie
defamatory.

Here it may be as well to observe, that matter, which is otherwise obviously defamatory, will not be the less actionable because it is put forward as matter of rumour, hearsay, or supposition. If the rule were otherwise every dealer in defamation would have free range on the lenient condition of always using some such preface to his libel as "I am informed," "I am of opinion" (b).

Defamatory
matter
published as
hearsay.

(b) Language is ambiguous where it is equally capable on the face of it of two meanings, the one defamatory and the other innocent. In a case of slander the imputation that the plaintiff is "foresworn" is ambiguous. It imputes the taking of a false oath, but the oath may have been in a judicial proceeding or it may not. In the latter alternative the words are not actionable, in the former they are (c). So, if it is said of a person that he has set his house on fire, it may be that what he has done is a felonious act, or it may be that it is a foolish and careless act. The words are ambiguous and of themselves not actionable as conveying the imputation of a criminal act (d). In *Goldstein v. Foss* (e) the plaintiff sued in respect of an alleged libel, the sting

Ambiguous
language.

(a) *Tomlinson v. Brittlebank*, (1833) 4 B. & Ad. 630.

(b) See *Harrison v. Thornborough*, (1713) 10 Mod. 196; *Watkin v. Hall*, (1868) L. R. 3 Q. B. 396; *Jenner v. A'Beckett*, (1871) L. R. 7 Q. B. 11; *M'Pherson v. Daniels*, (1829) 10 B. & C. 263; *Botterill v. Whytehead*, (1879) 41 L. T. N. S. 588. As has been pointed

out, however, it is no slander to impute mere suspicion of a felony; see above, p. 555.

(c) *Holt v. Scholesfield*, (1796) 6 T. R. 691.

(d) *Sweetapple v. Jesse*, (1833) 5 B. & Ad. 27.

(e) (1828) 6 B. & C. 154.

of which was that he and certain other persons were reported to a society of guardians for the protection of trade against swindlers "as improper to be proposed to be balloted for as members thereof," and the words were held not defamatory in themselves. They, no doubt, might be taken to impute that the plaintiff was an improper person to be proposed by reason of his bad character, but they were equally consistent with the supposition that the ground of his exclusion was some arbitrary rule involving no question of character (a).

Language
primâ facie
innocent.

(c) Language is innocent on the face of it when there is no possible defamatory meaning which the words taken by themselves can bear, or when the natural and obvious meaning is innocent, though it may be possible for ingenious malevolence to read between the lines and interpolate some far-fetched suggestion. In *Mulligan v. Cole* (b) the plaintiff had been a teacher at the Walsall Science and Art Institution. His employment terminated, and he subsequently became connected with an establishment similar in character and name. The defendants then published an advertisement stating that his connection with the Walsall Science and Art Institute had terminated, and that he was "not authorised to receive subscriptions on its behalf." The plaintiff sued on this as a libel, the innuendo laid being "that he had falsely pretended to be authorised to receive subscriptions." But it was held that the advertisement bore no such meaning of itself, and there being no further evidence, the plaintiff was nonsuited (c). In *McCann v. Edinburgh Ropery Co.* (d), the defendants sent a post-card to the plaintiff bearing the words "Settlement. If you do not remit by return the matter will be handed to our solicitors." It was held that the words could not of themselves bear the innuendo that the plaintiff was unable or unwilling to pay his debts. In *Nevill v. Fine Arts and General Insurance Co.* (e), the libel complained of was contained in a circular addressed to the holders of policies which had been

(a) See too *Gompertz v. Levy*, (1838) 9 A. & E. 282; *Simmons v. Mitchell*, (1880) 6 App. Cas. 156.

(b) (1875) L. R. 10 Q. B. 549.

(c) See also *Hunt v. Goodlake*, (1873), 43 L. J. C. P. 54; *Capital & Counties*

Bank v. Henty, (1880-2) 5 C. P. D. 514; 7 App. Cas. 741.

(d) (1889) 28 L. R. Ir. 24. See too *Searles v. Scarlett*, (1892) 2 Q. B. 56.

(e) (1895) 2 Q. B. 156.

effected with the defendants through the agency of the plaintiff, which circular stated that "the agency of Lord W. Nevill (the plaintiff) has been closed by the directors." The innuendo laid was that he had been dismissed for some reason discreditable to him. At the trial a clerk of the defendants proved that the circular as originally drafted stated that the plaintiff had resigned his agency, and that its form was altered with the object of inducing the policy holders to continue insuring directly with the defendants. The Court of Appeal, while of opinion that the circular on the face of it was incapable of the defamatory meaning suggested, thought that the evidence of the clerk was sufficient to warrant the judge in leaving the question to the jury. It is somewhat difficult to reconcile this case with the general current of authority. In considering whether a document is libellous or not the true question would seem to be, not what the writer intended, but what the average reader, knowing all the circumstances known to the addressee, would understand it to mean.

If the language is defamatory on the face of it, the plaintiff has of course no further difficulty; it speaks for itself, and he need allege, and in the first instance, prove nothing more. If the language is ambiguous, it is equally consistent with the negative and affirmative of the proposition which the plaintiff has to establish, namely that he has been defamed, and therefore, by proving simply the language he does not prove his case (a). *A fortiori* does he fail when the language is naturally innocent. In both these cases the plaintiff must bring forward additional facts and circumstances to specially point the meaning of the language where ambiguous, or specially qualify and alter its meaning where innocent. There are no words which may not possibly be proved defamatory. Words may be ironical, and used in a sense exactly opposite to that which is natural. They may by hidden reference convey an imputation that is altogether unconnected with their apparent meaning. The words, "I saw you in your red coat doing duty," were in one case held to convey an imputation of fraud and insolvency on a trader (b).

Evidence
in case of
ambiguous or
innocent
language.

Formerly the plaintiff, when unable to rely on the defamatory

Old form of
pleading.

(a) See for this principle, *Phillipson v. Hayter*, (1870) L. R. 6 C. P. 38.

(b) *Arne v. Johnson*, (1712) 10 Mod. 111.

matter alone, had not merely to plead the innuendo which he wished to establish, but also a *colloquium* or prefatory averment of the various circumstances which he relied on as proving that innuendo. He had to show on the face of his declaration with the minutest particularity a cause of action, and, if he failed to do so, it would be held bad on demurrer or motion for arrest of judgment. Great injustice was thus sometimes done to a litigant who lost his action by a trifling slip of his pleader, and in consequence by the Common Law Procedure Act of 1852 (a) all necessity for the *colloquium* was removed. Thenceforth any words capable on the face of them of a defamatory meaning, even though ambiguous, might be pleaded without innuendo (b).

Effect of
alteration in
pleading.
Laxity of
proof.

Licence of pleading introduced laxity of proof, and many *dicta* are to be found, to the effect that ambiguous language fairly capable of a defamatory meaning may be taken in such meaning without further evidence (c). This view was expressly adopted as the ground of decision in *Hart v. Wall* (d). The plaintiffs sued on certain letters which were "susceptible of two constructions, the one an innocent, the other a libellous construction" (e). No evidence seems to have been given except of the publication. The plaintiffs having been nonsuited, the nonsuit was set aside on the ground that the letters being "reasonably susceptible" of a defamatory construction ought to have been submitted to the jury.

Security for
costs in libel.

It may be convenient here to point out that insolvency and nonsuit in a former action for the same libel against another defendant have been held insufficient grounds for ordering a plaintiff in a libel action to find security for costs (f).

Lord
Blackburn's
opinion.

The case of *Hart v. Wall* is, however, obviously disapproved of by Lord Blackburn (g), who points out that the enactment in question was intended only to alter the form of pleading, and not the substance of proof. The plaintiff must persuade the jury to find

(a) 15 & 16 Vict. c. 76, s. 61. As to the effect of this, see *Watkin v. Hall*, (1868) L. R. 3 Q. B. 396.

(b) *Fray v. Fray*, (1864) 17 C. B. N. S. 603.

(c) *Per* Erle, C.J., *ibid.* p. 605; *per* Kelly, C.B., *Cox v. Lee*, (1869) L. R. 4 Ex. p. 288; *per* Lush, J., *Mulligan v.*

Cole, (1875) L. R. 10 Q. B. p. 550.

(d) (1877) 2 C. P. D. 146.

(e) *Per* Lord Coleridge, C.J., *ibid.* p. 149.

(f) *Le Mesurier v. Ferguson*, (1903) 20 T. L. R. 32, C. A.

(g) *Capital & Counties Bank v. Henty*, (1880-2) 7 App. Cas. pp. 776-82.

that he has been defamed, but he must also satisfy the judge that there is evidence to justify such a finding, and, as already pointed out, language equally capable of two significations affords in itself no evidence of one signification rather than the other.

Publication of defamatory matter, as far as regards civil proceedings, is only considered to take place when there is a publication to some person other than the party defamed. A husband and a wife are so far regarded as one that no publication can be made by means of a communication from one to the other (a). But defamatory matter may be published to the husband or wife of the person who is the subject of the defamation (b). A plaintiff may rely on a publication to his own agent, and the fact that such agent invited and procured the publication will not affect the defendant's liability (c). A libel may be published by reading the contents of the writing to a third person, or allowing him to read them for himself (d). It is by no means necessary for a plaintiff in all cases to prove directly that the incriminated matter was brought to the actual knowledge of any one. If he makes it a matter of reasonable inference that such was the fact, he establishes a sufficient *primâ facie* case. The posting of a letter is good evidence of a publication to the party to whom the letter was addressed (e). The circulation of copies of a book, containing libellous matter by a lending library is evidence of publication to the subscribers (f). The despatch of a postcard or telegram is good evidence of publication to the various post-office officials through whose hands it passes, for they have an opportunity of becoming acquainted with the contents (g). So, ordinarily, the printing of a libel imports, in the first instance, a publication to the persons employed in printing (h). So it

Publication.

Primâ facie
evidence.

(a) *Wennhak v. Morgan*, (1888) 20 Q. B. D. 635 ; and see *Young v. Young*, (1903) 5 F. 330, Ct. of Sess.

(b) *Wenman v. Ash*, (1853) 13 C. B. 836.

(c) *Duke of Brunswick v. Harmer*, (1850) 14 Q. B. 185.

(d) 5 Rep. p. 125b ; see *Hearne v. Stowell*, (1840) 12 A. & E. 732. But see *Smith v. Wood*, (1813) 3 Camp. 323.

(e) *Warren v. Warren*, (1834) 1 C. M. & R. 250.

(f) *Vizitelly v. Mudie's Library*, (1900) 2 Q. B. 170, C. A.

(g) *Williamson v. Freer*, (1874) L. R. 9 C. P. 393.

(h) *Per Cur., Baldwin v. Elphinston*, (1774) 2 W. Bl. p. 1038. See, however, *per Cur., Watts v. Fraser*, (1837) 7 A. & E. p. 233.

has been held that publication of a newspaper may be evidenced by the delivery to the stamp office (a). But in all these cases there is only a presumption which may be rebutted, for, if the person to whom publication is alleged upon being called denies that the defamatory matter came to his knowledge the proof fails (b).

Joint
publication.

The act of publication may be a joint tort, as where in pursuance of a common design one composes, another prints, and another distributes a libel. Moreover, a man may, without any direct participation in the publication, make himself liable for it.

Authorised
repetition.

“Not only he who publishes the libel himself, but also he who procures another to do it, is guilty of the publication” (c). Therefore, where at a board of guardians remarks defamatory of the plaintiff were made, and the chairman expressed a hope that the press would take notice of them, it was held that he was liable for the publication in a newspaper of a fair report of what occurred (d). And although a defendant is not generally liable for an unauthorised repetition or republication of defamatory matter (e), yet if he publishes to a person who is under a moral obligation to repeat it to some one else, he causes and procures this second publication, and is answerable for it (f). It is not merely in virtue of a particular authority given that a man may be responsible for a libel published by another. The maxim of *respondeat superior* applies, and if a servant in the due course of employment publishes a libel, the master can be sued. Therefore, if a libel is sold in a book shop or published in a newspaper, the proprietor of the shop or paper is civilly liable (g), whether he acts through an agent or in his own person. It is sometimes said that a slander cannot be a joint tort (h), but this, it would seem,

Publication
by agent.

Joint slander.

(a) *Rea v. Amphlit*, (1825) 4 B. & C. 35. addressee.

(b) *Clutterbuck v. Chaffers*, (1816) 1 Stark. 471. There are some *dicta* in *Rea v. Burdett*, (1820) 4 B. & Ald. 95, which taken by themselves would seem to show that the posting of a letter is not merely evidence of publication but necessarily a publication. However, the real meaning appears to be that the posting is the commencement of the publication which becomes complete when the communication reaches the

(c) Bac. Ab. Libel, B. 2.

(d) *Parkes v. Prescott*, (1869) L. R. 4 Ex. 169.

(e) *Ward v. Weeks*, (1830) 7 Bing. 211; see below, p. 622.

(f) *Derry v. Handley*, (1867) 16 L. T. N. S. 263.

(g) See *per* Lush, J., *Reg. v. Holbrow*, (1877) 3 Q. B. D. pp. 69–70.

(h) *Chamberlain v. White*, (1623) Cro. Jac. 647; *Coryton v. Litheby*, (1671) 2 Wm. Saund. 117c. in notes

only means that two persons who separately publish slanders conveying identical imputations cannot be jointly sued.

A corporation is liable for defamation uttered or published by its servant if the circumstances under which the defamation was published, were such as to bring it within the scope of the servant's employment (a).

Publication
by servant of
corporation.

The publication of a libel must be intentional, either on the part of the defendant or of somebody for whom he is responsible. The publication of a libel cannot be said to be intentional unless the person publishing it intended to issue the particular document in which the defamatory matter was contained, and also knew, or had reasonable means of knowing, the nature of its contents. But intention may be implied by neglect to take precaution against publication, and where this is alleged, the onus of proving absence of negligence in the dissemination of the libel is on the defendant (b).

Publication
must be
intentional.

If the defendant, having in his possession a document containing libellous matter, deliver it to a person by mistake for another and innocent document, he is not liable, even though he knew that the particular document which he in fact issued was libellous (c).

Mistake as to
identity of
document.

Again, if the defendant does not know, and has no reasonable means of knowing, and is under no legal obligation to know what he is publishing, though the matter published is libellous, yet his publication is innocent. He has not intentionally published a libel. Thus, the postman who delivers a libellous letter, although in one sense he shares in the publication, is not answerable; nor is anyone who is a mere vehicle of communication (d). On this principle the vendor of a newspaper in the ordinary way of business, although *prima facie* liable for every libel which it may happen to contain, is excused if he can prove that he did not know that it contained a libel, that his ignorance was not due to any negligence on his part, and that he did not know and had no ground for supposing that it was likely to contain defamatory matter (e). A somewhat curious case of

Ignorance of
contents of
document.

(a) *Citizens Life Assurance Co. v. Brown*, (1904) A. C. 423.

(b) *Vizitelly v. Mudie's Library*, (1900) 2 Q. B. 170.

(c) *Rea v. Paine*, (1696) 5 Mod. 163.

(d) Starkie on Slander and Libel, 2nd ed., vol. i., p. 227; *Day v. Bream*, (1837) 2 Moo. & R. 54.

(e) *Emmens v. Pottle*, (1885) 16

Q. B. D. 354. As regards the liability

publication free from defamatory intent and therefore innocent is found in the American reports. A writer had communicated to the defendant an article which was, in fact, defamatory of the plaintiff, but which appeared on the face of it to be a mere fancy sketch. This the defendant published in his newspaper without having any reason to be aware of its true nature, and it was held that he had a good defence, since he had done nothing which afforded any evidence of wilful wrong towards the plaintiff (a).

Publication
by mistake to
wrong person.

If, however, the defendant knows, or had the means of knowing the nature of the document which he issues, and issues it knowing that he is doing so, he will be liable, none the less because he issues it to a person to whom he had no intention of publishing it. Thus where the defendant, intending to send a libel to the plaintiff, sent it by mistake to a third person, it was held that this mistake did not affect the nature of his act. He intended a publication for which he was criminally, though not civilly, answerable, and he could not defend himself merely by saying that he did not intend to give the plaintiff a cause of action (b). A person who so issues libellous matter will be responsible even though he is under the mistaken impression that he is communicating it to a person to whom the communication is privileged. And this is so whether the mistake is as to the person to whom the communication is made, or as to the existence of facts which would give rise to a right or duty to make it. If the defendant writes defamatory matter in a letter to A., but by mistake places it in an envelope addressed to B., who receives and reads it, he will be liable even though the publication of the letter to A. would have been privileged (c). And he will equally be liable if, sending it to the person to whom he intended to send it, he made a mistake in supposing that that person had any such interest or

of the vendor of a monthly magazine, see *Chubb v. Flanagan*, (1834) 6 C. & P. 431. It is obvious that the vendor of a book would have greater difficulty in establishing his innocence than the vendor of a mere fugitive publication, and *a fortiori* the proprietor of a "select" library.

(a) *Smith v. Ashley*, (1846) 11 Met-

calfe, 367 (Massachusetts).

(b) *Fox v. Broderick*, (1864) 14 Ir. C. L. R. 453.

(c) This follows from the judgments in *Hebditch v. MacIlwaine*, (1894) 2 Q. B. 54, where the decision in *Tompson v. Dashwood*, (1883) 11 Q. B. D. 43, to the contrary, was overruled.

duty in the matter as would make the communication privileged (a). In all such cases the defendant issues the libellous matter at his peril.

Although, as a general rule, when a letter is addressed to a particular person, the writer is not responsible except for a publication to that person, yet, if he knows that in the ordinary course of things it may be opened by someone else (b), he must take the risk of such an event happening. If he wants to protect himself he should write "private" on the envelope (c).

Letter opened by third person.

Whether a lunatic is liable for the publication of a libel "depends upon whether he is sane enough to know what he is doing" (d). It would seem clear that if a person is so far out of his mind that he does not know what he is about, he cannot be said to act intentionally, and therefore cannot be responsible for any defamatory matter which he may publish. Of course lunacy does not give a general charter to commit wrongs. A lunatic may be even criminally liable if his lunacy have no bearing on the particular act in question.

Lunacy, when a defence.

When the plaintiff has once proved against a defendant an intentional publication of defamatory matter, he has established for the time being his case. It is then for the defendant to show either that his charge is not malicious or that it is not false. "To constitute a good defence . . . the defendant must negative the charge of malice (which in its legal sense denotes a wrongful act done intentionally without just cause or excuse), or show that the plaintiff is not entitled to recover damages. It is competent to the defendant, upon the general issue, to show that the words were not spoken maliciously by proving that they were spoken on an occasion or under circumstances which the law on grounds of public policy allows, as in course of a parliamentary

Two defences, justification and privilege.

(a) *Hebditch v. MacIlwaine*, *supra*.

(b) *Pullman v. Hill*, (1891) 1 Q. B. 524, where a letter addressed to a firm was opened by their clerk. The case of *Reg. v. Adams*, (1888) 22 Q. B. D. 66, went considerably further. There the prisoner wrote a letter to a girl, addressing it to her by her initials. The letter never reached her, having been opened by her mother, who happened to have

the same initials—a fact which was *a priori* highly improbable.

(c) *Per* Lopes, L.J., *Pullman v. Hill*, (1891) 1 Q. B. p. 529. As to what will amount to "publication" in the case of a postcard, see *Sadgrove v. Hole*, (1901) 2 K. B. 1, C. A.

(d) *Per* Lord Esher, M.R., *Emmens v. Pottle*, (1885) 16 Q. B. D. p. 356.

or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action he must plead that matter specially, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment) but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess" (a). The two defences indicated in this passage are known as justification, whereby a defendant proves the truth of the matter published, and privilege, whereby he shows the absence of malice. And first of justification.

Justification.

Facts alleged must be substantially true.

It has been already pointed out that a defamatory publication is to be understood in the sense which a jury properly attaches to it. It is in this sense, therefore, that a defendant must prove the matter true. The allegations of which the plaintiff complains may be either statements of fact or matters of comment or inference. The defendant need not prove the literal truth of every fact which he has stated. It is enough if he prove the substantial truth of every material fact (b). It must be considered what the gist of the matter is, and if there is no variation between the allegations to be justified and their proof sufficient to make any difference in the judgment of a reasonable man, the defendant is entitled to succeed. If it be alleged of a plaintiff that he has been convicted of an offence and sentenced to three weeks' imprisonment, whereas it appears that the term imposed was only fourteen days, it is a question for the jury whether the truth of the imputation is substantially made out (c). But on the other hand a printed statement, by the defendants, that the plaintiff had been fined or in the alternative was sentenced to a term of imprisonment with hard labour, when in fact no hard labour had been imposed, has been held actionable (d). Where

(a) *Per Littledale, M'Pherson v. Daniels*, (1829) 10 B. & C. p. 272. Of course this passage is not now an authority as to the form of pleading.

(b) As to the *quantum* of evidence that is admissible, see *Hewson v. Cleave*,

(1904) 2 Ir. R. 536, C. A.

(c) *Alexander v. North-Eastern R. Co.*, (1865) 6 B. & S. 340.

(d) *Gwynn v. South-Eastern R. Co.* (1868) 18 L. T. 738.

the libel was that a serious misunderstanding had taken place between a congregation and their minister "in consequence of invectives publicly thrown from the pulpit by the latter against a young lady," and that the matter was to be seriously taken up, and the plea of justification only dealt with the throwing of invectives, it was held sufficient, since the whole "sting of the charge" was misconduct in the pulpit and abuse of pastoral authority, and the allegations not covered by the plea did not affect the plaintiff's character (a).

But everything in the defamatory publication which adds weight to the imputation is material (b). Where the plaintiff, a schoolmaster, sued in respect of a libel, in which it was said that his school had been empty for seven years, that his violent conduct was the cause of its decay, and that he had violently treated some of his pupils, a plea which justified only the first and third of the allegations was held insufficient (c). So, where a criminal offence is imputed, the defendant, if he seeks to justify, must prove every circumstance of aggravation charged by him, although not altering the legal quality of the crime (d). If it is alleged against a man that he has actually committed a crime, the mere proof that he was convicted of it does not establish a justification, for his prosecution was *res inter alios acta*, and does not estop him from asserting his innocence against a stranger (e). To justify (f) comment a state of facts must be proved to exist which puts it beyond all question that the comment is well founded. The defamatory matter frequently consists partly of statements of fact, partly of observations founded on such statements. If the comment is merely such as inevitably arises out of the facts, proof amounting to a justification of the statement is a justification also of the comment. If it goes beyond this it asserts, by implication, further facts, which must also be shown to be true. Where the libel charged the plaintiff with fraudulent conduct in respect of a certain memorandum,

Every material fact must be justified.

Justification of comment.

(a) *Edwards v. Bell*, (1824) 1 Bing. 403; see too *Clarke v. Taylor*, (1836) 2 Bing. N. C. 654.

(b) *Weaver v. Lloyd*, (1824) 2 B. & C. 678.

(c) *Smith v. Parker*, (1844) 13 M. & W. 459.

(d) *Helsham v. Blackwood*, (1851) 11 C. B. 111.

(e) *Per* Bramwell, L.J., *Leyman v. Latimer*, (1878) 3 Ex. D. p. 354.

(f) For the right of "licentious" comment, see below, p. 605.

There can be no judicial proceeding where there is nothing before a Court with which it has jurisdiction to deal (a). If a judicial person while sitting upon the bench thinks fit of his own motion to deliver an harangue on any topic which he conceives to be of public interest, he does so at his peril. If, however, any application is made which on the face of it is not unfit to be heard, in order to see whether it is within the competence of the Court or not, the inquiry then instituted is a judicial proceeding, though the result be to show that there is no jurisdiction to deal with the matter (b). Nor is the absolute privilege attendant upon judicial proceedings avoided by the commission of some unintentional irregularity. Thus where an arrangement by consent was wrongly registered by the solicitor to one of the parties as a judgment of the Court, and was subsequently set aside, it was held that no action for libel would lie against him (c).

What are
judicial
proceedings.

It is not merely with respect to the hearing in open Court that there is absolute privilege, but also with regard to every step in the conduct of a legal proceeding. For instance, an affidavit filed in support of some interlocutory application can in no case give a cause of action (d). But where something is done as a mere preliminary to setting a Court in motion, as for instance where an information is laid, or notice of action is given, it may be doubted whether there is more than a qualified privilege, which may be defeated by proof of malice (e).

Relevancy.

In any proceeding *coram judice* the judge, advocate, or other

(1866) L. R. 1 Ex. 296. It seems to be assumed by 11 & 12 Vict. c. 44, s. 2, that an action lies against a magistrate for anything done maliciously in his office, that, therefore, he has not an absolute privilege. The true view, however, probably is, that a magistrate has just the same protection as any other judicial person: see below, p. 735. A County Council sitting to grant music and dancing licences is not a Court so as to cover with absolute privilege defamatory statements made in the course of the proceedings (*Royal Aquarium & Summer & Winter Garden Society, Ltd., v. Parkinson*, (1892) 1 Q. B. 431).

(a) See *Paris v. Levy*, (1860) 9 C. B. N. S. 342; *per cur.*, *Lewis v. Levy*,

(1858) E. B. & E. p. 555. The adjudication of a justice or other competent authority upon an application under the Lunacy Act, 1890, is a judicial proceeding (*Hodson v. Pare*, (1899) 1 Q. B. 455).

(b) *Reg. v. Bolton*, (1841) 1 Q. B. 66; *per Lord Coleridge, C.J.*, *Uill v. Hales*, (1878) 3 C. P. D. p. 323.

(c) *MacCabe v. Joynt*, (1901) 2 Ir. R. 115, Q. B. D.

(d) *Reris v. Smith*, (1856) 18 C. B. 126; *Henderson v. Broomhead*, (1859) 4 H. & N. 569.

(e) *Bank of British North America v. Strong*, (1876) 1 App. Cas. 307; see below, p. 641.

person who claims the privilege is protected while acting "in office." He may in the discharge of his function publish matter which is "uncalled for, immaterial, irrelevant, and impertinent" (a), and yet not be liable to answer for it. It would seem, however, that the language, to be privileged, though irrelevant, yet ought to have some reference to the subject-matter of inquiry; but even this restriction has been treated as open to question. "Suppose," it has been said, "while a witness was in the box a man were to come in at the door and the witness were to exclaim 'that man picked my pocket,' I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness-box wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything which a witness said as a witness should be protected, than that witnesses should be under the impression that what they said in the witness-box might subject them to an action" (b).

By 51 & 52 Vict. c. 64, s. 2, fair and accurate and contemporaneous reports in newspapers of judicial proceedings are absolutely privileged (c).

2. Everything published in the due course of parliamentary proceedings is absolutely privileged. No member of Parliament can be called on to answer for anything which he says in his place (d). The Houses of Parliament are for certain purposes Courts of Judicature. They hear counsel, and call parties and witnesses before them, and all that passes on such occasions is as fully protected as the proceedings in an ordinary Court of Law (e). They receive petitions and distribute among their members documents and papers, and into such publications the Courts cannot inquire (f). But at common law there is no parliamentary privilege for publishing defamatory matter to the outside world (g). However, by 3 & 4 Vict. c. 9, ss. 1, 2, a

Parliamentary proceedings.

(a) *Scott v. Stansfield*, (1868) L. R. 3 Ex. 220.

(b) *Per Bramwell, L.J., Seaman v. Netherclift*, (1876) 2 C. P. D. p. 60.

(c) See below, p. 599.

(d) 1 Will. & Mar. sess. 2, c. 2; *Ex parte Wason*, (1869) L. R. 4 Q. B. 573.

(e) *Goffin v. Donnelly*, (1880) 6

Q. B. D. 307; *per cur.*, *Kane v. Mulvaney*, (1866) Ir. Rep. 2 C. L. p. 415.

(f) *Lake v. King*, (1668) 1 Wm. Saund. 120: see *Stockdale v. Hansard*, (1839) 9 A. & E. 1; as to petitions, see below, p. 595.

(g) *Rex v. Creery*, (1813) 1 M. & S. 273; *Stockdale v. Hansard*, *supra*.

defendant who is sued for the publication of any papers by the direction of either House, or of any copies of such papers, may produce a certificate of his authority, verified by affidavit, to the Court in which the action is proceeding, and thereupon the action shall be stayed (a).

Official communications.

3. It must frequently be the duty of public servants, both civil and military, to publish matter of a defamatory nature, especially in the confidential reports which in the ordinary course of affairs it is necessary to furnish to the heads of departments and other superior officers. The privilege attaching to such communications is absolute. It has been held that an official report on one of his subordinates, furnished by a general to the Horse Guards, is privileged, though made maliciously and without reasonable and probable cause (b), and this on two grounds, one applying only to military and naval affairs, the other to the public service generally. It was said (c) that no one serving in His Majesty's forces can in respect of any matter of discipline or question affecting his military *status* appeal to any other jurisdiction than that which is created by the Mutiny Acts and the articles of war to which he has voluntarily submitted himself (d). It was also said to be a matter of public policy that all servants of the Crown should make their official communications without any possible fear of consequences before them, and that, therefore, their privilege was absolute (e). On this latter principle it has been held that a communication made by a Secretary of State to his Parliamentary Under Secretary in the course of his official duty cannot be made the subject of an action for libel (f).

Privilege against production.

Moreover, all writers of confidential official communications are protected by a privilege of a different kind, which does not indeed in terms cover their liability, but makes it practically impossible to prove a case against them. The production of

(a) See *Stockdale v. Hansard*, (1839) 11 A. & E. 297.

(b) *Dawkins v. Lord Paulet*, (1869) L. R. 5 Q. B. 94.

(c) *Per Mellor & Lush*, JJ.

(d) See too *Sutton v. Johnstone*, (1786-7) 1 T. R. 493; *In re Mansergh*, (1861) 1 B. & S. 400.

(e) *Per Mellor J.*, (1869) L. R. 5

Q. B. p. 115.

(f) *Chatterton v. Secretary of State for India*, (1895) 2 Q. B. 189. Though other judges have taken a different view: see *Beatson v. Shene*, (1860) 5 H. & N. 838; see too *Hart v. Gumpach*, (1872) L. R. 4 C. P. 439; *Grant v. Secretary of State for India*. (1877) 2 C. P. D. 445.

such documents will not be permitted in courts of justice, both because state secrets may be thereby disclosed, and because it is desirable that public servants should be able to write freely on matters affecting the public service without exposing themselves to the fear of actions. It is sufficient if the official who has the supreme control of the documents object to their production on the ground of public interest (a), but even without such objection the Court in fitting cases will act on its own responsibility (b).

The definition of "qualified privilege" may be best given in the words of a well-known judgment: "In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits" (c). There are three elements necessary to make the defence of qualified privilege good. The occasion must be fit, the matter must have reference to the occasion, and it must be published from right and honest motives. Thus there are two differences between privilege qualified and privilege absolute. In the case of the latter it is the occasion which is privileged, and when once the nature of the occasion is shown, it follows, as a necessary inference, that every communication on that occasion is protected. But in the case of the former the

Qualified
privilege.

Distinguished
from absolute
privilege.

(a) *Beatson v. Skene*, (1860) *supra*, p. 579; *Martin, B.*, diss. (1895) 2 Q. B. p. 195.

(b) *Hennesy v. Wright*, (1888) 21 Q. B. D. 509; see too *Home v. Bentinck*, (1820) 2 B. & B. 130; *Chatterton v. Secretary of State for India in Council*, (1834) 1 C. M. & R. p. 193; see *per* Lindley, L.J., *Stuart v. Bell*, (1891) 2 Q. B. p. 345.

(c) *Per Cur.*, *Tvogood v. Spyring*, (1834) 1 C. M. & R. p. 193; see *per* Lindley, L.J., *Stuart v. Bell*, (1891) 2 Q. B. p. 345.

defendant does not prove privilege until he has shown how the occasion was used. A communication on a privileged occasion, therefore, is not necessarily a privileged communication, though the terms are frequently used as convertible. "It is not enough to have an interest or duty in making a communication, the interest or duty must be shown to exist in making the communication complained of" (a). Secondly, even after a case of qualified privilege has been established, it may be met by the plaintiff proving in reply actual malice on the part of the defendant, for he thus shows that the plea is only colourable, and that under the pretence of doing his duty or protecting his lawful interest the defendant has been pursuing some by-end or gratifying his ill-will.

Functions of
judge and
jury.

The great difficulty in cases of qualified privilege is to disentangle the respective duties of judge and jury. Formerly a usual course was for the judge, if the circumstances raised a suggestion of privilege, to ask the jury whether the defendant had been acting *bonâ fide* in the exercise of his privilege, and also whether his motives had been malicious (b). The practical effect was that a defendant had to satisfy the jury in every case that he had acted prudently and properly as well as honestly. It seems to have been felt that this course was attended with inconvenience, and operated unduly to the prejudice of defendants, and accordingly a larger share of authority was taken into the judge's hands. In *Somerville v. Hawkins* (c) the defendant had discharged the plaintiff from his service. Subsequently the latter called to receive his wages, and the defendant then called in two other servants as witnesses, stated that he had dismissed the plaintiff for robbing him, and warned them against having anything to say to him in future. The plaintiff was nonsuited, and the non-suit was held to be correct, on the ground that the defendant had a duty and interest in making the communication in question, which was therefore *primâ facie* privileged, that his good faith could not be called in question without

Alteration
of law by
Somerville v.
Hawkins.

(a) *Per* Dowse, B., *Lynam v. Gowing*, (1880) 6 L. R. Ir. pp. 268-9.

(b) *Blackburn v. Blackburn*, (1827) 4 Bing. 395; *Bromage v. Prosser*, (1825) 4 B. & C. 247; *Pattison v. Jones*, (1828)

8 B. & C. 578. 3 & 4 Vict. c. 9, s. 3. shows what the general rule was understood to be at the time of its enactment.

(c) (1851) 10 C. B. 583.

some evidence of express malice, and that consequently, in the absence of such evidence, there was nothing to leave to the jury.

This case, the principle of which has been accepted and followed in a long chain of authorities (a), altered the law (b), and it has since then almost invariably been held that the question of privilege and the question of malice are entirely distinct; that the former is in the first place to be decided by the judge on the assumption of good faith on the part of the defendant, and that the latter only is for the jury, and to be proved affirmatively by the plaintiff. The judge, therefore, has not only to rule whether the occasion was privileged, but whether the communication in question had reference to the occasion. With any actual conflict of testimony the jury must of course deal, but, for the rest, the judge has to draw inferences both of law and fact, just as he does in the analogous case of reasonable and probable cause in actions of malicious prosecution. The rule here suggested, however, is one which though practically acted on has never been in terms authoritatively propounded, and it must be said to be still a doubtful matter how far a judge is bound to invite the assistance of the jury in deciding whether a communication is privileged or not. Where defamatory matter had been dispatched by telegram, and the privilege depended upon whether this method of communication was under the circumstances reasonable or not, the question of reasonableness was left at the trial to the jury (c).

Judge
to decide
whether com-
munication
privileged.

It would appear from recent decisions that when once it is ruled that the occasion is privileged and that the matter complained of has reference to the occasion, the only remaining question is whether the occasion was used without malice.

Unreasonable
use of
privileged
occasion only
evidence of
malice.

(a) *Taylor v. Hawkins*, (1851) 16 Q. B. 308; *Manby v. Witt*, (1856) 18 C. B. 544; *Harris v. Thompson*, (1853) 13 C. B. 333; *Amann v. Damm*, (1860) 8 C. B. N. S. 597; *Force v. Warren*, (1864) 15 C. B. N. S. 806; *Whitely v. Adams*, (1863) 15 C. B. N. S. 392; *Cook v. Wildes*, (1855) 5 E. & B. 328; *Laughton v. The Bishop of Sodor and Man*, (1872) L. R. 4 C. P. 495; *Henwood v. Harrison*, (1872) L. R. 7 C. P. 606; *Jenoure v. Delmege*, (1891) A. C.

73. The earlier case of *Gardner v. Slade*, (1849) 13 Q. B. 796, was decided on the same principle.

(b) *Per Erle, J., Cook v. Wildes*, (1855) 5 E. & B. 328, at p. 336.

(c) *Williamson v. Freer*, (1874) L. R. 9 C. P. 393. But probably the judge ought to have himself ruled that the communication was not privileged. See *per Lord Esher, M.R.*, (1891) 1 Q. B. p. 478.

In the headnote of *Clark v. Molyneux* (a) it is said that statements made on a privileged occasion will be protected even though made without any reasonable ground, provided it does not appear that the defendant acted from any indirect motive. This note, however, is founded on certain *dicta* in the case, but not on the actual decision, which was not on the question of privilege at all, but on the question of malice (b). But the same principle appears to be affirmed in *Pittard v. Oliver* (c); and in *Neville v. Fine Arts and General Insurance Co.* (d) it was decided that where the statement complained of has reference to the privileged occasion and therefore comes within it, the only remaining issue is that of malice, and the only way in which any excess in the statement is material, is as being evidence of malice, of which however it is by no means conclusive. In the last-mentioned case the jury found that the defendants had exceeded the privileged occasion, and it was held that that fact did not entitle the plaintiff to succeed in the absence of a finding of express malice. Where, however, extraneous statements are published which can have no reference to the privileged occasion or the occasion has been wilfully misused (e), it is apprehended that it becomes the duty of the judge to rule that so far as they are concerned the occasion is not privileged. Where a defendant, having received a lawyer's letter written on behalf of the plaintiff, replied in terms of general abuse of the latter, it was held that there was no privilege at all (f). Mere exaggeration of language, however, though it may be evidence of malice, will not destroy privilege (g).

Degree of
publicity.

With regard to the publicity given, it has been said that a

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| <p>(a) (1877) 3 Q. B. D. 237.
 (b) And see on this point, <i>Darby v. Ousely</i>, (1856) 1 H. & N. 1.
 (c) (1891) 1 Q. B. 474.
 (d) (1895) 2 Q. B. 156.
 (e) <i>Neville v. Fine Arts, &c.</i>, <i>supra</i>; <i>Hunt v. Great Northern R. Co.</i>, (1891) 2 Q. B. 189.
 (f) <i>Huntley v. Ward</i>, (1859) 6 C. B. N. S. 514. See also <i>Warren v. Warren</i>, (1834) 1 C. M. & R. 250; <i>Godson v. Home</i>, (1819) 1 B. & B. 7.
 (g) <i>Cook v. Wildes</i>, (1855) 5 E. & B.</p> | <p>328; <i>Cowles v. Pott</i>, (1865) 34 L. J. Q. B. 247, which seems to overrule <i>Tuson v. Evans</i>, (1840) 12 A. & E. 733: see also <i>per Willes, J.</i>, <i>Huntley v. Ward</i>, <i>supra</i>. The contrary appears to have been held in <i>Fryer v. Kinnersley</i>, (1863) 15 C. B. N. S. 422, and in <i>Robertson v. McDougal</i>, (1828) 4 Bing. 670, in both of which cases it could hardly be said that the intemperate expressions used were irrelevant to the privileged occasion; but it is submitted that these cases are no longer law.</p> |
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defendant will not lose his privilege because he goes somewhat beyond the strict necessities of the case. There is authority to show that where an occasion is otherwise privileged it will not lose its character by the fact of the casual presence of one (a), or even of several uninterested bystanders (b), and that such presence is material only on the question of malice. Some doubts arise as to the exact rule to be deduced from these cases. Of course, if a defendant has practically no opportunity of making his communication except in the presence of uninterested persons, it is just that his privilege should be unaffected. On this principle seems to have been decided the case of *Pittard v. Oliver* (c). The passage in *Toogood v. Spyring* (d), which says that the business of life must be carried on, impliedly asserts the same doctrine. In *Davies v. Snead*, however, no reasonable necessity seems to have existed. As already pointed out, when it has once been ruled that the occasion is privileged the privilege is not necessarily lost because the defendant used the occasion unreasonably, yet there must be a reasonable occasion or exigency (e) for the question of privilege to arise at all. There is no privilege if a man publishes a libel by postcard, or by a letter which he knows may be opened by the clerk of the addressee (f): but there seems little difference in principle between the case of a clerk or postman and that of a casual bystander. It seems clear that a clergyman may not publish in a pastoral letter matters which he would be privileged in mentioning by way of private advice and admonition to individual parishioners (g).

Where a communication would be privileged if made by a client, it will also be privileged if made by his solicitor acting on his behalf (h). Indeed the privilege of the solicitor in such case seems to be even wider than that of his client, for the solicitor will not lose his privilege by reason of his publishing the communication to a type-writing or a copying clerk employed by him

Solicitors.

(a) *Toogood v. Spyring*, (1834) 1 C. M. & R. 181. p. 194.

(b) *Davies v. Snead*, (1870) L. R. 5 Q. B. 608. (f) *Pullman v. Hill*, (1891) 1 Q. B. 524; but see *Sadgrove v. Hole*, (1901) 2 K. B. 1, C. A.

(c) (1891) 1 Q. B. 474.

(g) *Gilpin v. Fowler*, (1854) 9 Ex. 615.

(d) See below, p. 612.

(h) *Baker v. Carrick*, (1894) 1 Q. B.

(e) *Toogood v. Spyring*, *supra*, at 838.

in the conduct of his correspondence (a), whereas a similar publication by the client to his clerks would not be privileged (b). The ground upon which this distinction has been rested, seems to be that if a solicitor has occasion in the course of his business to write a defamatory letter, it is necessary that he should employ clerks for the purpose, but that if a layman has occasion to write a similar letter it is not necessary for him to employ clerks for the purpose, even though he be a merchant, but he ought to write the letter himself. The distinction does not seem altogether satisfactory (c).

Mistake.

It was formerly supposed that persons who, in seeking redress had applied to the wrong quarter, were protected if their error was a natural and not unreasonable one (d), but in the modern case of *Hebditch v. McIlwaine* (e), the authorities upon which this doctrine was based were explained away.

Charges
against more
than one
person.

It has also been decided that, where there is an imputation against two persons jointly, so that the misconduct charged against one cannot well be explained without introducing the name of the other, if circumstances exist which make the communication privileged as regards one person it will be privileged as regards both. Thus, where the defendant discharged the plaintiff, who was his footman, and also discharged at the same time his cook, and gave to the latter as his reason for so doing that she and the footman had been robbing him, it was held that the statement was privileged as against both (f).

Grounds of
privilege.

A privileged communication may be made in the discharge of a duty, or in the pursuance of a right, or for both reasons. It may be in the interest of the person to whom it is addressed, or in the interest of the person making it, or in their common interest, or finally in the public interest (g). Under which of these heads

(a) *Borsius v. Goblet Frères*, (1894) 1 Q. B. 842.

(b) *Pullman v. Hill*, (1891) 1 Q. B. 524.

(c) It has been held the issue by a joint-stock company of a printed circular containing defamatory matter to their shareholders was privileged, notwithstanding that it involved a publication to the printers: *Lawless v. Anglo-Egyptian Cotton Co.*, (1869) L. R. 4

Q. B. 262.

(d) *Fairman v. Ives*, (1822) 5 B. & Ald. 642; *Harrison v. Bush*, (1855) 5 E. & B. 344.

(e) (1894) 2 Q. B. 54.

(f) *Manby v. Witt*, (1856) 18 C. B. 544; see *Davies v. Snead*, (1870) L. R. 5 Q. B. 608.

(g) Communications made in the public interest ought not perhaps to be called privileged, since to make them is

a particular case may fall it is not always easy to determine ; indeed, privilege may frequently be put upon more than one ground. A few illustrations are here given without any pretence to an exhaustively accurate classification.

It is to be observed that privilege depends not upon the notion in the defendant's own mind as to his right or duty, but upon the view which the Court takes of what his right or duty in fact was under the circumstances as known to him (*a*).

1. The commonest form of privileged communication is that which is made in the interest of the person to whom it is addressed. "Where a person is so situated that it becomes right in the interest of society that he should tell to a third person certain facts" (*b*), he is privileged in so doing. The facts must be important for the person in question to know; they must be for the guidance and regulation of his conduct (*c*). If the communication cannot influence conduct there is no privilege. Thus, where the agent of one side in a contested election wrote to the opposing agent, after the close of the poll, accusing a certain voter of bribery, it was held that as the recipient of the letter had no jurisdiction to punish or to inquire into the alleged bribery, and was not invested with authority to institute proceedings in respect of it, and as any duty he might have had with reference to the election was entirely over at the time it reached him, he had no interest or authority in the matter, and there was no legal excuse for the publication (*d*).

Interest of person to whom communication made.

The privilege will depend partly upon the nature of the communication, partly upon the relation in which the parties stand to one another. A defendant may protect himself by showing either that he was in a position of confidence or intimacy with the person to whom he published the matter complained of, or

a general and not a special right. See *Merivale v. Carson*, (1887) 20 Q. B. D. 275. The distinction, however, is verbal rather than substantial.

(*a*) "The question is, what is the defendant's duty ; not what he *thinks* to be his duty : " *per* Byles, J., *Whitely v. Adams*, (1863) 15 C. B. N. S. p. 412. And see *Hebditch v. Mcllwaine*, (1894) 2 Q. B. 54 ; *Stuart v. Bell*, (1891) 2 Q. B.

341.

(*b*) *Per* Blackburn, J., *Davies v. Snead* (1870) L. R. 5 Q. B. p. 611 ; see *per* Lindley, L.J., *Stuart v. Bell*, (1891) 2 Q. B. p. 351 ; *Hunt v. Great Northern R. Co.*, (1891) 2 Q. B. 189.

(*c*) See *Bromage v. Prosser*, (1825) 4 B. & C. 247.

(*d*) *Dickeson v. Hilliard*, (1874) L. R. 9 Ex. 79.

that he acted in consequence of a request for information lawfully made, or that although a mere volunteer he had such special means of knowledge as imposed a special obligation upon him.

Positive duty. (a.) There are, of course, certain cases in which it is a duty not of imperfect but of clear and peremptory obligation for one man to disclose all he knows to another. A servant or agent is bound to lay before his employer all the information which he possesses with regard to the interests entrusted to his care (a). So, where two or more people are jointly intrusted with the protection of any interest, or the conduct of any investigation, it is clearly proper that the confidential communication between them of all matters affecting the discharge of their duty should be free and unrestrained (b). However, the doctrine of privilege arising out of confidential relationship has been extended very widely beyond the ground of positive duty, and whenever one man stands on such a footing with another that he may reasonably and properly take upon himself to tender advice or information, he will be privileged in so doing. Thus, a master may warn his servants against the character of an associate (c). But apparently the officials of a trades union may not communicate to its members or others information which they know will result in a breach of the contractual rights of third parties (d). A near relation may give a lady his opinion of her suitor (e). A solicitor may give warning to a client of any peril to his interests, though not professionally consulted (f). The relationship of host and guest imposes upon the former a social and moral duty to inform the latter of suspicions which have fallen upon his servant (g). A member of Parliament may publicly give political advice and

Confidential
relationship.

(a) *Lawless v. Anglo-Egyptian Cotton Co.*, (1869) L. R. 4 Q. B. 262; *Cook v. Wildes*, (1855) 5 E. & B. 328.

(b) *Beatson v. Skene*, (1860) 5 H. & N. 838; *Hopwood v. Thorn*, (1849) 8 C. B. 293; *Harris v. Thompson*, (1853) 13 C. B. 333.

(c) *Somerville v. Hawkins*, (1851) 10 C. B. 583; *Hunt v. Great Northern R. Co.*, (1891) 2 Q. B. 188.

(d) *Glamorgan Coal Co. v. South Wales Miners' Federation*, (1903) 2

K. B. 545, C. A.; affirmed *sub nom. South Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A. C. 239 H. L.; *Reud v. Friendly Society of Stone Masons*, (1902) 2 K. B. 732, C. A.

(e) *Todd v. Hawkins*, (1837) 8 C. & P. 88.

(f) *Davies v. Rees*, (1855) 5 L. C. L. R. 79.

(g) *Stuart v. Bell*, (1891) 2 Q. B. p. 359, *per Kay*, L.J.

information to his constituents, and a bishop ecclesiastical advice and information to his clergy, and if in so doing they publish defamatory matter, it will be *primâ facie* privileged (a). A parochial clergyman, it would seem, is not, under ordinary circumstances, privileged in publishing to his parishioners at large matters defamatory of any individual, although the imputations are such as it might be his duty to convey in the course of private admonition (b). It has been held that a clergyman is privileged in conveying to the incumbent of a neighbouring parish imputations on the character of a person invited by the latter to occupy his pulpit (c), and that a parishioner is privileged in informing his clergyman of slanders current with regard to the latter (d). Where persons have once been brought into confidential relationship on a certain subject-matter, subsequent communications on the same topic are privileged. Thus, an employer who has given another a character of a servant may afterwards correct and qualify his previous statements (e), and a person who has received a servant with a character, which he finds to be undeserved, is privileged in communicating his opinion to the former employer (f).

(b.) Any answer to a question which appears to be put for the guidance of the questioner's conduct in a matter of practical importance, is privileged. Thus, if one trader makes inquiries of another with regard to the solvency of persons with whom he proposes to have dealings, the latter is protected in communicating any information which he possesses (g). Where inquiries are being made with a view to the detection of a criminal offence, any answer honestly given affords no ground for action, though it involve a direct charge of felony (h). Of this principle the most familiar example is afforded by the protection which is

Information
in answer to
inquiry.

(a) *Per Cur.*, *Wason v. Walter*, (1868) L. R. 4 Q. B. p. 95; *Laughton v. The Bishop of Sodor and Man*, (1872) L. R. 4 P. C. 496. And see *Barratt v. Kearns*, (1905) 1 K. B. 504, C. A.

(b) *Gilpin v. Fowler*, (1854) 9 Ex. 615; *Magrath v. Finn*, (1877) Ir. R. 11 C. L. 152.

(c) *Clark v. Molyneux*, (1877) 3 Q. B. D. 237, C. A.

(d) *Duxie v. Snead*, (1870) L. R. 5 Q. B. 608.

(e) See *Gardner v. Slade*, (1849) 13 Q. B. 796.

(f) See *Child v. Affleck*, (1829) 9 B. & C. 403; *Wilson v. Robinson*, (1845) 7 Q. B. 68. This, however, is doubted in *Fryer v. Kinnerley*, (1863); see *per* Erle, C.J., 15 C. B. N. S. p. 429.

(g) See *Robshaw v. Smith*, (1878) 38 L. T. N. S. 423.

(h) *Kine v. Sewell*, (1838) 3 M. & W. 297.

Voluntary communication
in the case of a
defendant.

accorded to masters in giving characters of servants, although the privilege in this case has been put on the ground of the servant's implied assent. The mere fact, however, that a man is asked a question does not necessarily give him privilege. He ought to be reasonably satisfied that his questioner has some interest or duty in the matter. "It is no part of a man's duty to go into the confessional to every chance person who may choose to ask impertinent questions." If a question is first invited and then answered by a defamatory statement, such statement is to be considered as purely voluntary (c). So, if the defendant has without lawful occasion impugned the plaintiff's character, and then, on being challenged, reaffirms what he stated before, he will not be privileged in so doing. It is otherwise, however, if the first statement is privileged. The original publication and its repetition and vindication stand on the same footing (d).

Volunteered
communications
in the case of a
defendant.

(c.) Volunteered communications were formerly regarded with much less liberality than they are at the present day. It has sometimes been suggested that an uninvited communication not made in pursuance of any special duty, though it may be privileged, carries with it some evidence of malice, and that it is for the defendant in such a case to satisfy the jury of his good faith (e). Other opinions went so far as to deny all privilege to volunteered communications made by an entire stranger.

In *Coxhead v. Richards* (f) the plaintiff was in command of a merchant vessel. The defendant received from the mate of that vessel, who was his friend, a letter imputing drunkenness and

(a) It is suggested by Lord Alvanley, C.J. (*Rogers v. Clifton*, (1803) 3 B. & P. p. 592), that if a servant knowing that he will get a bad character, writes an application to his former master, no action lies in respect of anything that may be published in consequence, because the master has been entrapped. It was held, however, in *Duke of Brunswick v. Harmer*, (1850) 14 Q. B. 185, that a plaintiff might sue in respect of a publication which he himself had procured.

(b) *Per Erle, C.J., Force v. Warren*, (1864) 15 C. B. N. S. p. 808.

(c) *Gardner v. Slade*, (1849) 13 Q. B. 796.

(d) *Griffiths v. Lewis*, (1843) 7 Q. B. 61; *Taylor v. Hawkins*, (1851) 16 Q. B. 308.

(e) *Pattison v. Jones*, (1828) 8 B. & C. 578. It must be remembered, however, that at the date of this decision, it was customary in all cases to leave the question of good faith to the jury. It is overruled in *Gardner v. Slade, supra*, where it is pointed out that if an occasion is privileged at all the mere use of it cannot be evidence of malice.

(f) (1846) 2 C. B. 569.

other grave charges against his captain, and asking for advice. The defendant, after consideration and consulting with experienced persons, placed the letter in the hands of the owners, who consequently ceased to employ the plaintiff. The Court was equally divided as to whether the communication was privileged. Two judges (*a*) held it to be so on the ground that, information of a most important character having come into the defendant's possession, it was his duty to disclose it to those whose interests were concerned. The other two (*b*) denied the privilege, on the ground that the defendant was an entire stranger to all the parties, and that if he were held excused it would give licence to all the world to go tale-bearing. A like division of opinion was found among the same judges in a case decided about the same time, in which the defendant had volunteered an imputation on the plaintiff's solvency to a person intending to give the latter credit (*c*). The more liberal view, however, appears now to be established (*d*). Volunteered communications are not now considered to stand on any special footing, and the officiousness of the intervention is merely one matter to be considered among others. A servant or a friend may properly convey information or give advice, which would be impertinent on the part of a stranger. The latter is only entitled to interfere when he has some special means of information on a matter of practical importance. Thus, where the defendant had reason to believe himself robbed by the plaintiff, Willes, J., considered that he was discharging a social duty in giving information to the plaintiff's employer (*e*). In *Stuart v. Bell* (*f*) the plaintiff was a valet, and he and his master were staying with the defendant, who was a magistrate and mayor of Newcastle. The chief constable of Newcastle showed the defendant a letter which he had received

Communication volunteered by stranger should be based on special knowledge.

(*a*) Tindal, C.J., and Erle, J.

(*b*) Coltman and Cresswell, JJ.

(*c*) *Bennett v. Deacon*, (1846) 2 C. B. 628.

(*d*) See *per* Willes, J., *Amann v. Damm*, (1860) 8 C. B. N. S. p. 602; *per* Blackburn, J., *Davies v. Snead*, (1870) L. R. 5 Q. B. p. 611; *per* Lindley, L.J., *Stuart v. Bell*, (1891) 2 Q. B. p. 347.

(*e*) *Amann v. Damm*, (1860) 8 C. B.

N. S. p. 601.

(*f*) (1891) 2 Q. B. 341. The judgments, however, do not proceed solely upon the ground that the defendant was a volunteer, but also, and in the case of Kay, L.J., principally, on the ground of the relationship of host and guest which existed between the defendant and the plaintiff's master.

from the Edinburgh police, stating that the plaintiff was suspected of having committed a theft; it was held that the communication of that fact by the defendant to the plaintiff's master was upon a privileged occasion. But it cannot be of importance to anybody to have general gossip repeated to him, or to learn the opinions of people with whom he has no concern. Thus in *Botterill v. Whytehead* (a) the defendant, a clergyman, wrote to a committee engaged in restoring a church, strongly protesting against the employment of the plaintiffs as architects, and imputing to them ignorance and incompetence, and the communication was held unprivileged.

Common
interest.

2. Communications between parties who are alike concerned in the condition of some property, or the management of some undertaking, are privileged on the ground of their common interest.

Thus, it is privileged for a tenant to complain to his landlord of the misconduct of a person employed by the latter to repair the tenant's premises (b). It is privileged for a landlord to complain to the tenant of such conduct on the part of the tenant's lodgers as may injure the reputation of the house (c). Where the defendant had repudiated liability for goods supplied to an order purporting to come from him, and on being shown the order expressed the belief that it was in the plaintiff's handwriting, it was held that this statement was privileged, inasmuch as it was directed to the investigation of a matter in which the defendant and the person supplying the goods were alike interested (d).

Interest must
be direct.

The character and capacity of a servant is no doubt a matter of common interest to all whom he serves. It is not, however, a privileged topic for discussion for those who have no direct responsibility in the matter. The mere fact that two people are both subscribers to a society, or both shareholders in a company, does not privilege them in communicating to one another defamatory matter with respect to their officials (e). In ordinary

(a) (1879) 41 L. T. N. S. 588.

(b) *Toogood v. Spyring*, (1834) 1 C. M. & R. 181.

(c) See *Knight v. Gibbs*, (1834) 1 A. & E. 43.

(d) *Croft v. Stevens*, (1862) 7 H. & N. 570.

(e) *Brooks v. Blanshard*, (1833) 1 C. & M. 779; *Martin v. Strong*, (1836) 5 A. & E. 535; with which cases compare

cases all complaints should be made to the directors, or committee, or other persons to whom the management of affairs is delegated. The intervention of the general body is confined to special occasions, and communications on such occasions are no doubt privileged if pertinent to the business in hand. The mass of members of societies and corporations usually meet for election purposes, and they are obviously entitled on such occasions to freely interchange information as to the qualifications of the candidates before them (a). So, it would seem clear that everything passing at the meetings of boards of guardians, town councils, and other local governing bodies is privileged if relevant and honestly made for the purpose of enabling, by means of free discussion, those present to better discharge their common duty.

In *Andrews v. Nott Bower* (b) the magistrates for a borough had ordered the head constable of the borough to prepare, for the purpose of facilitating the business of the general annual licensing meeting, a report stating the grounds of objections taken to the renewal of licences, and to issue copies to persons having business before the meeting, and it was held that the publication of the report in pursuance of the orders of the magistrates was upon a privileged occasion.

3. The third class of communications to which a qualified privilege attaches, are those which a man makes in his own interest, in defence either of his property or his character. Where the defendant, having sold goods to the plaintiff on credit, subsequently learnt that the latter had sold off his stock and was not to be found, and, thereupon, gave notice to the auctioneer in whose hands were the proceeds of the plaintiff's sale not to pay them over to him, on the ground that he had committed an act of bankruptcy, the communication was held privileged (c).

Interest
of person
making the
communica-
tion.

So, where a creditor of a half-pay officer in the army wrote to the Secretary at War complaining that his debtor was deliberately

Harris v. Thompson, (1853) 13 C. B. 333.

(b) (1895) 1 Q. B. 888.

(a) See *Brooks v. Blanshard*, *supra*, p. 591; *Kershaw v. Bailey*, (1848) 1 Ex. 743.

(c) *Blackham v. Pugh*, (1846) 2 C. B. 611; approved in *Baker v. Carrick*, (1894) 1 Q. B. 838.

this judgment had reference to the Crown only in its judicial capacity (a). When a petition is addressed to the executive the privilege is only qualified (b).

In order to protect individuals in the reasonable use, for the purposes of discussion and information, of extracts and abstracts of papers published by Parliamentary authority, it is enacted by 3 & 4 Vict. c. 9, s. 3, that it shall be lawful "to give in evidence under the general issue such report, paper, note, or proceedings, and to show that such extract or abstract was published *bonâ fide* and without malice, and if such shall be the opinion of the jury, a verdict of not guilty shall be entered." It is to be observed that, in cases falling under this enactment, the judge is bound to deal with the issue of privilege in the manner customary before the decision in *Somerville v. Hawkins* (c), and cannot withdraw the case from the jury even though there be no evidence of express malice.

Parliamentary papers.

Fair comment and criticism on matters which have become public property, and fair reporting of certain public proceedings, are protected, even although involving imputations on the characters of individuals. The principles upon which this protection rests have been a matter of some controversy (d).

Comment and reporting.

In *Henwood v. Harrison* (e), the defendants had commented with great severity on certain plans submitted to the Admiralty by the plaintiff, and thrown reflections on his capacity, and it was held that the defendant had a right of comment, the matter being one of national importance, that he had not exceeded his right, and that consequently, no evidence of actual malice being given, there was no case to submit to the jury. This decision, therefore, treated comment on the footing of ordinary privilege, leaving it to the judge to decide not merely as to the occasion, but as to the fitting use of the occasion.

Conflict of authority.

In *Campbell v. Spottiswoode* (f) it was left to the jury to say whether a review published in the defendant's newspaper of the

(a) *Per* Pollock, B., *Webster v. Proctor*, (1885) 16 Q. B. D. 113.

(b) *Fairman v. Ives*, (1822) 5 B. & Ald. 642; *Webster v. Proctor*, (1855) 16 Q. B. D. 112.

(c) (1851) 10 C. B. 583. See above, p. 531.

(d) For recent cases on "fair comment," see *Hewson v. Cleere*, (1904) 2 Ir. R. 536, C. A.; *Joynt v. Cycle Trade Publishing Co.*, (1904) 2 K. B. 292, C. A.

(e) (1872) L. R. 7 C. P. 606.

(f) (1863) 3 B. & S. 769.

plaintiff's book was within the limits of fair criticism, and also whether it had been written in good faith. The first question they answered in the negative, and the second in the affirmative, and it was held that these findings amounted to a verdict for the plaintiff. In other words, comment intrinsically unfair is not protected merely because it is not inspired by any malicious motive.

Fairness of
comment
or report
question for
jury.

It is to be observed that both these cases agree in requiring that the comment should be both fair in itself and inspired by no dishonest motive; the substantial difference is that in the one the question of fairness is treated as being for the judge, in the other as being for the jury. The latter view must be considered as the one now accepted (a).

The law in respect to the right of comment is thus laid down, in terms which it is presumed apply equally to the right of reporting. "It is important to bear in mind that the question is not whether the publication is privileged but whether it is a libel. The word privilege (b) is often used loosely and in a popular sense when applied to matters which are not properly speaking privileged. But for the present purpose the meaning of the word is that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in anyone else. . . . If it could be shown that the editor or publisher of a newspaper stands in a privileged position it would be necessary to prove actual malice. . . . I take it to be certain that he has only the general right which belongs to the public to comment upon public matters. . . . In such cases everyone has a right to make fair and proper comment, and so long as it is within that limit it is no libel" (c).

Honesty
as well as
fairness
requisite.

The words "fair comment" at the conclusion of this passage are somewhat ambiguous. Fair comment, properly speaking, is relevant comment, suggested although not necessarily justified by the subject matter (d). It might, therefore, be supposed that a

(a) *Merivale v. Carson*, (1887) 20 Q. B. D. 275.

(b) As a matter of fact, the word privilege is almost invariably used in the cases dealing with the right of reporting and the right of comment.

(c) *Per* Blackburn, J., *Campbell v.*

Spottiswoode, (1863) 3 B. & S. pp. 780-1; approved in *Merivale v. Carson*, (1887) 20 Q. B. D. 275, *supra*. The words, "no libel," must, it is conceived, be taken as equivalent to "not actionable," not as equivalent to "not defamatory."

(d) *Per* Bowen, L.J., *Merivale v.*

comment fair in this sense would be absolutely protected. It is doubtful, however, whether this is the case, for if the comment, though on the face of it "fair," is proved to be written with a malicious intent and is defamatory, there is no true exercise of the right (a). In this respect there is a close analogy with qualified privilege (b). Very considerable latitude, however, is admissible in matters of public interest. It being "only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all" (c). In the old case of *Carr v. Hood* (d) cited with approval by the Court of Appeal in *McQuire v. Western Morning News* (e), Lord Ellenborough said, "We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous." . . . "Show me an attack on the moral character of the plaintiff, or any attack on his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule."

The general result of the various decisions on this point is that where protection is claimed for the publication of matter which is of a defamatory nature on the ground that it is a fair report or comment, it is for the judge in the first instance to decide whether, under the circumstances, any right of comment or

Province of
judge and
jury.

Carson, supra, at p. 283. See, as to the distinction between a "fair" report and a *bonâ fide* report, *per* Brett, M.R., *MacDougall v. Knight*, (1886) 17 Q. B. D. p. 640.

(a) See *Joynt v. Cycle Trade Publishing Co.*, (1904) 2 K. B. 292, C. A.

(b) "It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shown that the defendant was not really criticising the work, but writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think it would, and for this reason, that the comment would not then be really a criticism of the work." *Per* Brett, M.R., *Merivale*

v. Carson, (1887) 20 Q. B. D. p. 281.

(c) *Merivale v. Carson, supra*, Bowen, L.J., at p. 283. This statement of the law was approved in *South Hetton Coal Co. v. North-Eastern News Association*, (1894) 1 Q. B. pp. 143, 145, *per* Lopes and Kay, L.JJ. In the analogous case of a report of proceedings in Court, malice on the part of the publisher has been held to justify a judgment against him, notwithstanding that the report was a fair one. *Sterens v. Sampson*, (1879) 5 Ex. D. 53. This decision would seem to support the view of Brett, M.R., rather than that of Bowen, L.J.

(d) Note to *Tabart v. Tipper*, (1808) 1 Camp. at p. 356.

(e) *McQuire v. Western Morning News*, (1903) 2 K. B. 100.

report exists, and whether the publication in question is capable of being regarded as the exercise of such a right (a). It is then for the jury to say whether the publication in itself is fair (b). The further question of malice may also arise if the plaintiff has given any evidence of it.

Reports.

The right of reporting extends to proceedings in Courts of Law, proceedings in Parliament, and proceedings of public meetings and bodies.

Of judicial proceedings.

1. The general right of reporting legal proceedings has long been recognised. This right is, however, subject to certain restrictions where, in preliminary criminal proceedings resulting in the committal of the accused for trial, the partial character of the report is such as is calculated to prejudice the prisoner on his trial, and consequently to impede the due administration of justice (c). Apart from this qualification it has been broadly laid down that "when you once establish that a court is a public court a fair *bonâ fide* report of all that passes there may be published" (d); and in one modern case (e) it was held that the publication of a fair and accurate report of proceedings in open Court before magistrates upon an *ex parte* application for the issue of a summons for perjury was protected.

The privilege, however, does not attach to reports of all judicial proceedings, but only to reports of such proceedings as take place in an open court, that is to say, in a court to which the public are in fact admitted (f). The reason of the privilege is that, those of the public who are unable to obtain admission, owing to the accommodation of the court being limited, have a right to know through the medium of reports all that took place in the hearing of those who obtained admission. Therefore a report of what took place in judges' chambers would not be privileged (g).

(a) *Green v. Chapman*, (1837) 4 Bing. N. C. 92; *Popham v. Pickburn*, (1862) 7 H. & N. 891; *Lewis v. Clement*, (1820) 3 B. & Ald. 702; in Exch. Ch., 3 B. & B. 297.

(b) *Campbell v. Spottiswoode*, (1863) 3 B. & S. 769; *Merivale v. Carson*, (1887) 20 Q. B. D. 275.

(c) *Rex v. Parke*, (1903) 2 K. B. 432; *Rex v. Fleet*, (1818) 1 B. & Ald. 379; *Duncan v. Thwaites*, (1824) 3

B. & C. 556.

(d) *Per Bramwell, B., Ryalls v. Leader*, (1866) L. R. 1 Ex. p. 300. See *per Cur.*, *Wason v. Walter*, (1868) L. R. 4 Q. B. p. 94.

(e) *Kimber v. The Press Association* (1893) 1 Q. B. 65.

(f) *Kimber v. The Press Association*. (1893) 1 Q. B. 65.

(g) In *Smith v. Scott*, (1847) 2 C. & K. 580, Coleridge, J., indeed directed a jury

The privilege extends to copies of the records of a court which are open to the public and relate to judicial proceedings (a).

As regards newspapers it has been enacted that "a fair and accurate report in any newspaper (b) of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter" (c). If the words of this section be compared with those of the next, it will appear that the words "fair" and "accurate" are practically equivalent, that considerations of motive are excluded, and that, consequently, the report if correct will be absolutely privileged (d). The excepted cases of reports of proceedings held with closed doors, and reports of a blasphemous and indecent nature, correspond with the exceptions recognised by the common law (e).

What is reported must be fairly a part of the proceeding. There is no right in anyone to report the unauthorised observations of a by-stander (f): nor even what a judge or magistrate says, unless in office. "As to magistrates, if while occupying the bench from which magisterial business is usually administered, they under pretence of giving advice, publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the Commission of the Peace, reports of what passes before them is as little privileged as if they were illiterate mechanics in an alehouse" (g). But, as already pointed out,

that they might find such a report to be privileged; but the question whether judges' chambers are an open Court was not discussed.

(a) *Seurles v. Scarlett*, (1829) 2 Q. B. 56; *Williams v. Smith*, (1888) 22 Q. B. D. 134; *Annaly v. Trade Auxiliary Co.*, (1890) 26 L. R. Ir. 394.

(b) A newspaper is defined as "any paper containing public news, intelligence or occurrences, or any remarks or observations therein, printed for sale and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers;" 51 & 52 Vict. c. 64, s. 1; 44 & 45 Vict.

c. 60, s. 1.

(c) 51 & 52 Vict. c. 64, s. 3. There is nothing in this section to protect the reporter in so far as he makes a publication by sending his manuscript. See *Stevens v. Sampson*, (1879) 5 Ex. D. 53.

(d) The use of these words is strictly correct, as newspapers are now given special rights.

(e) *Per Cur.*, *Lewis v. Levy*, (1858) E. B. & E. at p. 558; *Rex v. Carlile*, (1819) 3 B. & Ald. 167; *Steele v. Brannan*, (1872) L. R. 7 C. P. 261.

(f) *Lynam v. Gowing*, (1880) 6 L. R. Ir. 259.

(g) *Per Cur.*, *Lewis v. Levy*, (1858) E. B. & E. p. 554. See *Paris v. Levy*, (1860) 9 C. B. N. S. 342.

REPORTS.

There is a wide difference between cases where a magistrate acts
in a judicial capacity and cases where, although it may
be a question of law, the magistrate is not acting in a judicial
capacity. It is necessary to distinguish between the two cases.
In the first case, the magistrate is acting in a judicial capacity
and his decision is final.

The second case is where the magistrate is acting in an administrative
capacity. In this case, his decision is not final and may be
subject to appeal.

It is important to note that the distinction between the two cases
is not always clear. In some cases, the magistrate may be acting in
an administrative capacity, but his decision may have judicial
consequences.

For example, if a magistrate orders a person to be detained, this
is an administrative act. However, if the person is detained for
a long period, it may become a judicial matter.

It is therefore necessary to consider the facts of each case
carefully in order to determine the capacity in which the
magistrate is acting.

In the case of a judicial decision, the magistrate's decision is
final and cannot be appealed. In the case of an administrative
decision, the decision may be appealed.

The distinction between the two cases is of great importance
because it determines the rights of the parties and the scope of
the magistrate's powers.

It is therefore essential to understand the distinction between the
two cases in order to ensure that the law is applied correctly.

The distinction between the two cases is a fundamental principle of
the law and must be understood by all who are involved in the
administration of justice.

It is therefore necessary to consider the facts of each case
carefully in order to determine the capacity in which the
magistrate is acting.

In the case of a judicial decision, the magistrate's decision is
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The distinction between the two cases is of great importance
because it determines the rights of the parties and the scope of
the magistrate's powers.

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whether the judgment would be privileged unless the jury found that it contained an accurate account of all the evidence on which it was founded (a). But on the point coming again before the Court of Appeal, the judges discussed and approved of their previous decision (b).

If an ordinary individual were to publish a contemporaneous report of proceedings on one day which bore hardly against the character of an individual, and were to omit to publish the subsequent proceedings which served to clear his character, such conduct, although it might not altogether make the publication unprivileged, would afford strong evidence of malice. It may be, however, that a newspaper proprietor under such circumstances would be protected. The publication would appear to be absolutely privileged at the time, and such absolute privilege could not well be divested by matter subsequent (c).

As will be seen hereafter, it is not actionable to discuss what has occurred in a Court of Justice, but such discussion ought not to be mixed with the report. It is one thing to lay the evidence fairly before the reader, and then to invite him to draw certain conclusions from it, another to prejudice the mind and colour the whole report by a running commentary. If this is done the report becomes unfair, and therefore is not protected. Much less must the reporter import information of his own. "A paper may give a report of the proceedings of Courts of Justice properly condensed and fair, but it is not entitled, under pretence of giving a report, to add comments of its own, or to display facts not brought forward in the proceedings" (d). A strong example of the danger of introducing comment into the body of a report is afforded by the case of *Lewis v. Clement* (e). The libel sued on was headed "Shameful conduct of an attorney," and contained a report of certain proceedings on the discharge of an insolvent, in which very strong observations were made on the plaintiff, the attorney in question. The defendant pleaded that the supposed

Mixed
comment and
report.

(a) (1886-9) 14 App. Cas. 194.

(b) *Macdougall v. Knight*, (1890) 25 Q. B. D. 1.

(c) 51 & 52 Vict. c. 64, s. 3.

(d) *Per* Cockburn, C.J., *Risk Allah Bey v. Whitehurst*; (1868) 18 L. T. N. S. p. 618. See too *Stiles v. Nokes*, (1806) 7

East, 493; *per Cur.*, *Lewis v. Lory*, (1858) E. B. & E. p. 553; *Hibbins v. Lee*, (1864) 4 F. & F. 243; and see *Rea v. Parke*, *supra*, (1903) 2 K. B. 432.

(e) (1820) 3 B. & Ald. 702; in Exch. Ch., 3 B. & B. 297.

libel was a true report of the proceedings, and the jury found the issue in his favour. But the plaintiff had judgment *non obstante veredicto*, because the heading contained an allegation against the plaintiff which was no part of the report.

Parliamentary
reports.

2. The right to report Parliamentary debates stands upon the same footing as the right to report proceedings in Courts of Law. "It seems clear that the principles on which the publication of reports of proceedings of Courts of Justice have been held to be privileged apply to the reports of Parliamentary proceedings. The analogy between the two cases is in every respect complete. . . The analogy between the case of reports of proceedings of Courts of Justice and those of proceedings in Parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach to the other" (a). One of the limitations laid down in the judgment is that fragmentary reports are not protected, except when published by persons standing in some special relation, as members towards their constituents.

Where
strangers
excluded.

It is further suggested in *Wason v. Walter* (b) that the right of reporting Parliamentary debates would still be recognised by the Courts, even though it were forbidden by a resolution of either House, or though the debates were held in secret. In this case, however, the analogy between proceedings in Parliament and proceedings in Courts of Law fails. The public have a right to be present at the latter, except in certain special cases; they have no such right with regard to the former (c). Reports are only intended to give members of the public who are absent the same means of knowledge as are enjoyed by those who are present.

Reports
of public
meetings.

3. The general current of decisions has been adverse to the notion that any protection is given to reports of ordinary public meetings. It has been held that he who publishes accounts of proceedings of local governing bodies does so at his peril (d). However, in *Davis v. Duncan* (e) it was held a good defence that the libel sued on was a description of certain proceedings at an

(a) *Per Cur.*, *Wason v. Walter*, (1868) H. & N. 891.
L. R. 4 Q. B. pp. 93-4.

(b) (1868) L. R. 4 Q. B. p. 95.

(c) See *per Mellish, L.J.*, *Purcell v. Sowler*, (1877) 2 C. P. D. pp. 220-1.

(d) *Davison v. Duncan* (1857) 7 E. & B. 229; *Popham v. Pickburn*, (1862) 7

(e) (1874) L. R. 9 C. P. 396. A similar point is discussed but not decided in *Purcell v. Souler*, (1877) 2 C. P. D. 215. See *Pierce v. Ellis*, (1856) 6 Ir. C. L. R. 55.

election meeting, but it does not seem clear whether the publication in question was treated as a report or as a comment on a matter of public interest. As regards newspapers, however, it is now enacted by 51 & 52 Vict. c. 64, s. 4, that "a fair and accurate report published in any newspaper of the proceedings of a public meeting or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town-council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select Committees of either Houses of Parliament (a), justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police or chief constable, of any notice or report issued by them for the information of the public, shall be privileged unless it shall be proved that such report or publication was published or made maliciously." The section goes on to except from its protection cases in which the publication in question is blasphemous and indecent, cases in which there has been a refusal to insert a reasonable letter of explanation or contradiction, and cases in which the matter published is not of public concern and for the public benefit. Considerable difficulty will probably arise as to the effect to be given to this last exception, but it obviously imposes on reporters the responsibility of excluding all irrelevant matter of a defamatory nature which may be dragged into a public discussion. A public meeting is defined to be "any meeting *bonâ fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted" (b).

Newspapers.

With regard to the right of comment and criticism two

Comment and criticism.

(a) It seems clear that with respect to committees of Parliament the enactment is unnecessary. There is no distinction between such a committee and

a Court of Law. See *Goffin v. Donnelly*, (1880) 6 Q. B. D. 307.

(b) 51 & 52 Vict. c. 64, s. 4.

questions arise: first, what is meant by comment; secondly, what are the topics in respect of which comment is allowable.

Justifiable
and licentious
comment.

1. As has been already pointed out, comment which is nothing more than inference and remark, obviously, and as it were necessarily arising out of a state of facts proved to exist, needs no privilege. It comes under the plea of justification. "God forbid," says Alderson, B., "you should not be allowed to comment on the acts of all mankind, provided you do it justly and truly" (a). But such acts as are considered public property are "open to what may be called licentious comment as opposed to comment that must be based in truth" (b).

Licentious
comment does
not include
statements
of fact.

It is with "licentious," or permissible, comment that we now have to deal, and it must always be borne in mind that such comment, though it need not rigidly conform to fact, yet must have some reasonable basis in fact. This is implied in the word itself. For a comment there must be a text. The licence which the law gives in respect of drawing inferences is great, but it does not permit the fabrication of premises. It is not, therefore, because a certain topic is one of general interest, that random defamatory statements may be made with regard to the reputations of individuals who may have been concerned in the matter. "To say that you may first libel a man and then comment on him is obviously absurd" (c). "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct" (d). The line, however, between statement and discussion is one which it is not always easy to draw, and in

(a) *Gathercole v. Miall*, (1846) 15 M. & W. p. 340.

(b) *Per* Pollock, C.B., *ibid.* p. 334.

(c) Cockburn, C.J., *Reg. v. Carden*, (1879) 5 Q. B. D. p. 8.

(d) *Per Cur.*, *Davis v. Shevstone*,

(1886) 11 App. Cas. p. 190. See, too, *Popham v. Pickburn*, (1862) 7 H. & N. 891; *per* Erle, C.J., *Walker v. Bregden*, (1865) 19 C. B. N. S. p. 74; *Purcell v. Souler*, (1877) 2 C. P. D. 215.

some of the cases exaggerated assertions of fact, in themselves defamatory, have been allowed to pass muster as coming within the protection of comment (a).

Not only must there be a fitting text for the comment, but the comment must be confined to the text. One portion of a man's life may be public property, but it is not therefore lawful to comment on the whole (b). If a book or play is criticised the author may be attacked for the ignorance, bad taste, or absurdity which he shows in his work, but he must be dealt with as an author and not as a man. If his general character is assailed, this is not criticism but the making of defamatory assertions (c). Moreover though a publication be genuine comment, it does not necessarily follow that it is "fair," not because it is malicious, nor because it is irrelevant, but because it is perversely unjust (d). Although even in such extreme circumstances, it is doubtful whether, apart from wilful misstatement as to the sentiments contained in, or wilful misquotation of passages from, the adversely criticised book or play, the injurious comments will support an action for libel (e). A person taking on himself publicly to criticise and condemn the conduct and motives of another must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure" (f). The exercise of the discretion thus entrusted to juries will depend partly on popular sentiment, partly on the nature of the subject-matter. Such greater latitude no doubt will be allowed in dealing

Must adhere
to the text.

Must not be
perversely
unjust.

(a) *Kelly v. Tinling*, (1865) L. R. 1 Q. B. 699; *Davis v. Duncan*, (1874) L. R. 9 C. P. 396. In *Cox v. Feeny*, (1863) 4 F. & F. 13, Cockburn, C.J., held that the publication of a report containing statements of fact defamatory to the plaintiff was privileged because it was information which it was important for the public to know; and in *South Hetton Coal Co. v. North-Eastern News Association, Limited*, (1894) 1 Q. B. 133, misstatements and exaggerations were assumed, but were treated only as evidence for the jury of

unfairness.

(b) See, however, *Seymour v. Butterworth*, (1862) 3 F. & F. 372. But this case seems open to considerable doubt.

(c) *Carr v. Hood*, (1808) 1 Camp. 355, n.; *Campbell v. Spottiswoode*, (1863) 3 B. & S. 769.

(d) *Merivale v. Carson*, (1887) 20 Q. B. D. 275.

(e) *McQuire v. Western Morning News*, (1903) 2 K. B. 100, C. A.

(f) *Per Cur.*, *Wason v. Walter*, (1868) L. R. 4 Q. B. p. 96.

with matters of taste and opinion than with matters involving questions of conduct and character (a).

Basis of
comment.

2. The basis for comment may be facts which are notorious and undisputed—facts of common knowledge and contemporary history; it may be matter already lawfully published, such as privileged reports; it may be matter put forward by the plaintiff himself, as in the case of criticism of a book; or it may be facts which are proved for the first time by the defendant.

Broadly speaking, there seem to be two classes of cases in which free comment is held allowable; those in which the public interest arises out of the subject-matter itself, and those in which the complaining party has himself challenged public attention.

Matters of
Church and
State.

(a.) Everything which directly affects the welfare of Church and State is clearly a matter of general public interest, and there can be no dispute as to the privilege of discussion with regard to the policy of the government, the administration of justice, the proceedings of the legislature, the conduct of the executive in civil and military affairs, and generally the manner in which all those who may be called public servants discharge their duties (b).

Local admin-
istration.

There are, however, many matters which might at first sight seem purely local in their bearing, but which, nevertheless, are considered of interest to the nation at large as being parts of a general system. In *Purcell v. Sowler*, the Common Pleas Division, holding the conduct of a local poor law official not a privileged topic, laid down the rule as follows:—"Where this kind of privilege is invoked, it must be shown either that the person of whom the defamatory matter is written was a person whose position and character are of general interest to the whole country, or that the subject-matter dealt with is one of general interest to the whole country. . . . It is not enough to show that he fills a public character of a limited kind and in a limited

(a) If the passage from *Wason v. Walter*, quoted above, be compared with the definitions of fair criticism given in *Merivale v. Carson*, *supra*, it will be found that the latter are expressed in laxer terms. The reason probably is,

that in the one case the character of a man was in question, in the other the character of a play.

(b) *Wason v. Walter*, (1868) L. R. 4 Q. B. 73; *Henswood v. Harrison*, (1872) L. R. 7 C. P. 606.

district, or that the subject-matter dealt with is a matter of interest only to a small portion of the public or to the public in a limited district, and not a matter of general public interest" (a).

In the Court of Appeal (b) the principle thus laid down was not questioned, but the explanation given of it was widely different. The poor law being a matter of national importance, it was denied that any distinction could be taken between its local and its general administration. "It is one of the characteristic features of the government of this country that, instead of being centralised, many important branches of it are committed to the conduct of local authorities. Thus, the business of counties and that of cities or boroughs, is, to a great extent, conducted by local and municipal government. It is not, therefore, because the matter under consideration is one which in its immediate consequences affects only a particular neighbourhood that it is not a matter of public concern" (c). The previous decision of *Kelly v. Tinling* (d) is quite in accordance with these observations. In that case it was held privileged to discuss as a matter of general public importance the precise manner in which worship was carried on in a particular church (e). On the same principle it would probably be held that the affairs of any institution in the administration of which the State had any voice, such as for example one of that numerous class, under the control of the Charity Commissioners, are matters of general public interest.

Institutions which are entirely in private hands, whatever their importance, are not properly liable to be discussed by the world at large, unless indeed the support or intervention of the public is in some way invited. There seems, for example, no reason to suppose that there would, except under special circumstances, be any right to comment on the affairs of the various Nonconformist

Institutions
free from
public
control.

(a) (1877) 1 C. P. D. p. 788.

(b) (1877) 2 C. P. D. 215.

(c) *Per* Cockburn, C.J., (1877) 2 C. P. D. p. 218.

(d) (1865) L. R. 1 Q. B. 699.

(e) See, too, *Walker v. Brogden*, (1865) 19 C. B. N. S. 65, and *Gathercole v. Miall*, (1846) 15 M. & W. 319, in which case the Court were equally divided as

to the right of discussing the clergyman's sermon. In order that a member of the public may have sufficient interest to obtain a faculty for the removal of an illegal ornament from a particular church, it is necessary for him to show that he is a parishioner: *Kensit v. St. Ethelburga (Rector)*, (1900) P. 80; *Davey v. Hinde*, (1903) P. 221.

bodies, which, of course, are purely voluntary associations. In *Gathercole v. Miall* (a), the plaintiff, a beneficed clergyman, had established in his parish, with the assistance of certain other people, a charitable society. For the principles on which this charity was managed he was attacked in the defendant's newspaper. It was decided that there was no right of comment on this matter, not because the society was merely of local importance, but because it was entirely private and voluntary in its nature.

In the case of *South Hetton Coal Co. v. North Eastern News Association* (b), however, the Court of Appeal adopted a view which went far beyond any of the previously decided cases. They thought that the conduct of a private business, if of sufficiently large an extent and relating to a sufficiently large number of persons, will be a matter of public interest, and may be commented on as such. In that case the plaintiffs were colliery proprietors and landlords of the bulk of the cottages in a village of a population of two thousand. The Court were of opinion that the sanitary condition of these cottages which were let by the plaintiffs to their colliers might be commented on as a matter of public interest. That expression of opinion, however, was not strictly necessary to the decision, the jury having found that the defendants had exceeded the limits of fair comment.

Criticism is invited.

Literary and artistic criticism.

(b.) The true ground on which that special kind of comment known generally as criticism seems to rest is that he who appeals to the public must be judged by the public. Every "man," says Lord Ellenborough in a well-known passage, "who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right" (c). This right has been so universally accepted that before the decision in *Merivale v. Carson* the law of literary and artistic criticism had been nowhere fully discussed. There is no doubt however that every species of literary production

(a) *Supra*, p. 608.

ibid.

(b) (1894) 1 Q. B. 133. The question whether a particular matter is of public interest or not is for the judge to decide :

(c) *Carr v. Hood*, (1808) 1 Camp. p. 358.

down to a newspaper (*a*) is fair game for the critic: and even the handbill of an advertising tradesman has been dealt with on the same principle (*b*). Works of art (*c*) at a public exhibition, public performances, both musical and dramatic (*d*), have to undergo the ordeal of public judgment, whether expressed through the press, or in case of the latter, by the immediate applause or censure of the audience (*e*). Whether there is equal liberty with regard to the works of an architect, except so far as they are in themselves of a public nature, may be doubted. No one is invited to give an opinion as to the skilfulness which has been displayed in the erection of a private house, except the person who has given the order (*f*).

Appeals of every kind through the press and platform are daily being made to the public intelligence, the public conscience, and the public pocket. Whatever the nature of these appeals or the position of those who make them, discussion is clearly invited, and that discussion is free. One man promulgates a quack remedy (*g*), another man invites attention to a scheme for the suppression of quacks (*h*). A Presbyterian divine proposes to convert China wholesale to Christianity (*i*), a popular agitator proposes to convert England wholesale to republicanism (*k*). All such projectors and benefactors of their species are liable to have their methods and ends considered, ridiculed, and condemned.

The right or privilege of publishing defamatory matter must (excepting in cases of absolute privilege) be exercised for the purpose of attaining the objects for which it is given. The ostensible motive of the party making the publication in such

Appeals to the public.

Malice.

(*a*) *Campbell v. Spottiswoode*, (1863) 3 B. & S. 769.

(*b*) *Paris v. Levy*, (1860) 9 C. B. N. S. 342.

(*c*) *Thompson v. Shackell*, (1828) M. & M. 187.

(*d*) *Dibden v. Swan*, (1793) 1 Esp. 27; *McQuire v. Western Morning News*, (1903) 2 K. B. 100, C. A.

(*e*) *Gregory v. Duke of Brunswick*, (1843) 1 C. & K. 24. The right to criticise dramatic performances, even in the absence of any evidence of conspiracy, has, however, been impugned, possibly on the ground that public

demonstrations of approval or disapproval may tend to a breach of the peace.

(*f*) As to architects, see *Soane v. Knight*, (1827) M. & M. 74; *Botterill v. Whytehead*, (1879) 41 L. T. N. S. 588.

(*g*) *Hunter v. Sharpe*, (1866) 4 F. & F. 983.

(*h*) See *Dunne v. Anderson*, (1825) 3 Bing. 88.

(*i*) *Campbell v. Spottiswoode*, (1863) 3 B. & S. 769.

(*k*) *Odger v. Mortimer*, (1873) 28 L. T. N. S. 472.

cases is to serve the legitimate interest of himself or of other people, but if the plaintiff can show that his motive is not the true one, that the defendant has misused the occasion for some illegitimate purpose of his own, he disposes of his defence. The absence of proper motive is called express malice or malice in fact. Express malice is sometimes said to be a real thing as opposed to malice in law or implied malice, which is a mere technical expression. In truth, however, they are fundamentally identical. A libel is malicious in law until a probability of right motive is shown; it is malicious in fact after that probability is disposed of by the evidence. In both cases the conclusion is the same though arrived at in different ways. The plaintiff commences by showing a conscious violation of his right, and to that he returns.

Absence of
right motive.

It seems, therefore, a mistake to say, as is sometimes done, that the jury on the issue of express malice, have to find affirmatively the existence of bad motive in the defendant's mind. They have simply to negative the right or privilege. If they are satisfied of the absence of proper motive they need not carry their inference further. If they are satisfied of the presence of a bad motive they may find for the plaintiff, not because the defendant is to be punished for his malice by the loss of the protection to which *primâ facie* he is entitled, but because the presence of a bad motive is ground for inferring the absence of right motive, and therefore shows that there never was any right or privilege at all.

Definition of
malice in
fact.

"To illustrate that what is called malice in fact means nothing more or less than absence of legal excuse; suppose A. has untruly said B. is a thief under circumstances that, A. believing B. to be a thief, would constitute a legal excuse. A familiar instance of this is the case of giving, as it is termed, the character of a former *employée*. In the case supposed the material inquiry is: What was A.'s belief? To answer this inquiry, and only for the purpose of answering this inquiry, it may be material to ascertain what feeling A. had towards B.; if the feeling or intention is found to be friendly, it is a link in the chain of evidence that A. spoke believing what he said. If the feeling or intention of A. towards B. was unfriendly, it is a link in the chain of evidence

that A. spoke rather from that feeling or intent, or for some purpose other than from his belief; and being spoken without belief of its truth, the speaking was out of the pale of legal excuse, and was wrongful, not merely or in any wise because of the intent, which may have been good or bad, but because the speaking was not under circumstances which constitute a legal excuse; namely, under a belief that the words spoken were true" (a).

Absence of rightness of conduct is evidence of absence of rightness of motive, and therefore it is sufficient evidence of malice if the defendant in the publication complained of has exhibited a lack of truth, candour, and reasonableness. It has been seen already (b) that privilege is not necessarily denied to a defamatory communication on account of the use of exaggerated language or the casual presence of an uninterested bystander (c) but such matters may become very material when it is inquired with what motive the communication was made. Therefore, where the defendant had employed the plaintiff on a piece of work and afterwards, in making a complaint to him on the subject, used, in the presence of a third party, the language which was the alleged cause of action, it was held that it was *primâ facie* privileged, but that the jury must say whether it was malicious or not (d).

Evidenced by unreasonable conduct.

"The simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed on this and similar communications, and if, on every occasion in which they are made, they were not protected unless strictly private. . . . The mere fact of a third person being present does not render the communication absolutely unauthorised, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bonâ fide* in making the charge or been influenced by malicious motives" (e).

(a) Townsend on Slander and Libel, s. 90. But see the judgment of Brett, L.J., in *Clark v. Molyneux*, (1877) 3 Q. B. D. p. 247.

(b) See above, p. 583.

(c) Nor is privilege necessarily avoided by a person being called in for the

express purpose of hearing the statement: *Taylor v. Hawkins*, (1861) 16 Q. B. 308.

(d) *Toogood v. Spyring*, (1834) 1 C. M. & R. 181.

(e) *Per Cur.*, *Toogood v. Spyring*, (1834) 1 C. M. & R. p. 194.

Violence of
language.

In many cases it has been decided that unnecessary violence of language is evidence of malice. Thus, in *Cooke v. Wildes* (a) the defendant, a deputy clerk of the peace, had ceased to employ the plaintiffs to do certain printer's-work for the county. He addressed a letter to the magistrates to explain his reasons and after a statement of facts, which showed the plaintiffs to have demanded unfair terms on false grounds, proceeded to speak of them as having attempted "to extort a considerable sum from the county by misrepresentation." This last expression, it was said, must be left to the jury as evidence of malice. "The whole letter certainly refers to the subject of printing the register, and no irrelevant calumny is introduced into it; but it contains strictures upon the motives and conduct of the plaintiffs which the facts stated may not warrant, and which may be considered quite unnecessary to vindicate what the defendant had done about the printing of the register and could be of no service to the Finance Committee, or to the Quarter Sessions, in auditing the account (b).

Strong
language
not always
evidence of
malice.

It would seem from this case to be particularly incumbent on any one, who has to make a statement of facts for the guidance of others, to avoid indulgence in unnecessary comment or imputation of motives. Where, however, a man is acting in self-defence or in the vindication of his character, somewhat greater licence is allowed him, and his language is not to be scrutinised with minuteness in order to raise an inference of malice. In *Laughton v. The Bishop of Sodor and Man* (c), the plaintiff had severely inveighed against the Bishop in a public speech. The latter addressed to his clergy and published in the newspapers a charge, in which he repelled with great warmth the plaintiff's attacks, impugning his motives and speaking of him as a wicked man. It was contended that this language was in itself evidence of malice. But, says the judgment (d), "it is enough that, having regard to the circumstances and nature of the attack upon him, the Bishop may, in their Lordships' opinion, have honestly believed that everything which he said was true and proper for

(a) (1855) 5 E. & B. 328.

(b) *Per Cur.*, *ibid.*, p. 340; see, too, *Wright v. Woodgate*, (1835) 2 C. M. & R. 573; *Cowles v. Potts*, (1865) 34 L. J.

Q. B. 247; *per Cur.*, *Gilpin v. Fowler*, (1854) 9 Ex. p. 627.

(c) (1872) L. R. 4 P. C. 495.

(d) (1872) L. R. 4 P. C. pp. 508-9.

his own vindication, although in fact some of his expressions exceeded what was necessary for it; and that the language of his charge was more consistent with such honest belief and with the purpose of self-vindication than with that of injuring the plaintiff."

The language used must always be considered with regard to the facts, not as they were in reality but as they may be fairly taken to have appeared to the defendant. Vehemence of language is not in itself evidence of malice, but wanton violence is (a).

As a general rule it is not right to make defamatory statements unless they are believed to be true. It may indeed sometimes happen that where a confidential relationship exists, one man may communicate to another rumours and reports not as matters for which he himself vouches, but as requiring attention and fit to be investigated (b). But no one can suppose he has a right or a duty to make definite charges in which he does not believe, and, if he does so, he shows that absence of right motive which is malice. If he has spoken as of his own knowledge a *prima facie* case against him is made by evidence showing the charge to be untrue. For although the truth is not directly in issue, yet his knowledge is; and if he has said that he knows as a fact something which is not a fact, he has uttered a falsehood and therefore is malicious. "Unquestionably the master who has given a bad character of a servant to persons inquiring after his character is not bound to substantiate by proof what he has said; but it is equally clear that the servant may, if he can, prove the character to be false; and the question between the master and the servant will always, in such case, be whether what the former has spoken respecting the latter be malicious" (c).

Knowledge of
falsity of
charge.

In *Fountain v. Boodle* (d) the plaintiff had served the defendant as daily governess. She was dismissed without cause assigned. The defendant subsequently, in answer to an application as to the plaintiff's character, wrote that she had dismissed her "on

(a) *Spill v. Maule*, (1869) L. R. 4 Ex. 232. See *Nerille v. The Fine Arts Gen. Ins. Co.*, (1895) 2 Q. B. 156; *Royal Aquarium, &c., Society v. Parkinson*, (1892) 1 Q. B. 431.

(b) *Per* Bramwell, L.J., *Clark v. Molyneux*, (1877) 3 Q. B. D. p. 244.

(c) *Per* Lord Alvanley, C.J., *Rogers v. Clifton*, (1803) 3 B. & P. p. 591.

(d) (1842) 3 Q. B. 5.

account of her incompetency and not being ladylike nor good-tempered." The plaintiff swore that no complaint had been made to her during the engagement, and certain of her friends gave evidence as to her being competent, ladylike, and good-tempered. It was held that a case was made out requiring an answer, and that in the absence of any evidence from the defendant to show on what grounds she had acted, the jury might presume the character not to have been honestly given.

Where, however, the publication complained of imputes some specific piece of misconduct or incapacity to the plaintiff, it will not avail him to give general evidence of his good conduct or capacity, since it is perfectly possible that a man may have acted on the particular occasion in opposition to his general character, and therefore such evidence does not substantially tend to prove the falsity of the charge (a). It is not necessary, in order to establish a *prima facie* case of malice, to show that all the imputations made are false: it is enough that some of them are (b).

Where, however, the libellous statement as to character was made in answer to a deceptive letter forwarded for the purpose of entrapping the defendant, the deceit of the plaintiff will avoid his right of action (c).

Direct
evidence of
ill-will.

A plaintiff may be able to show from extrinsic facts that the defendant harboured feelings of spite and ill-will towards him, and it may thence be fairly inferred that the publication in question was prompted by such feelings and, consequently, not by a legitimate motive. It by no means, however, follows that this inference must of necessity be drawn. The jury in such a case ought to satisfy themselves that the ill-will caused, as well as accompanied, the action. "Suppose a man to be applied to for the character of a servant, and he is angry with that servant and says, 'He is a bad servant, he has stolen my spoons,' that communication would be privileged if a man has acted *bonâ fide*, intending honestly to discharge a duty. . . . Suppose a reporter for the press bore malice towards a person a party to the action,

(a) *Brine v. Bazalgette*, (1849) 3 Ex. 10 Q. B. p. 905.
692.

(c) *King v. Waring*, (1803) 5 Esp. 14.

(b) *Per Cur.*, *Blagg v. Sturt*, (1847)

and published a fair report of the proceedings injurious to him. I incline to think that, as he would be performing a kind of duty, it ought to be taken that he is acting under privilege. I do not think that the public press has any peculiar privilege" (a). These observations must be taken, it would seem, as indicating Lord Bramwell's view of the caution that ought to be given to juries in dealing with the evidence, not as deciding that under such circumstances as he suggests, the question of malice could be withheld from them. It would probably be found that if they were once satisfied of a feeling of ill-will in the defendant's mind, they would not easily be prevented from finding also that such feeling caused the publication.

"You may give in evidence any words as well as any act of the defendant to show *quo animo* he spoke the words which are the subject of the action" (b). Therefore defamatory language used towards the plaintiff by the defendant on other occasions, whether prior (c) or subsequent to the cause of action, will be good evidence of malice. It is not, however, admissible for a plaintiff to administer interrogatories to a defendant for the purpose of eliciting from him previous statements derogatory to his character (d).

Previous
defamation.

In the case of slanderous words spoken subsequent to the cause of action, it may, however, become the duty of the judge to warn the jury against necessarily inferring that an ill feeling, first shown to exist after the date of the publication complained of, was its antecedent and cause. The facts may be consistent with the ill feeling having a later origin (e).

Motive may be shown by the conduct of the litigation and the manner in which the case is shaped at the trial. Therefore, where a defendant, who pleaded the truth of the libel, in court neither attempted to establish the plea, nor yet would retract the charge, it was held that by so acting he afforded evidence of

Conduct of
litigation.

(a) *Per* Bramwell, L.J., *Sterens v. Sampson*, (1879) 5 Ex. D. p. 55. And now see 51 & 52 Vict. c. 64, s. 3.

395; *Darby v. Ouseley*, (1856) 1 H. & N. 1.

(b) *Per* Lord Ellenborough, C.J., *Russell v. Macquister*, (1807) 1 Camp. p. 49 n.

(d) *Caryll v. Daily Mail Publishing Co.*, (1904) 90 L. T. 307, C. A.

(e) *Hemmings v. Gasson*, (1858) E. B. & E. 346.

(c) *Barrett v. Long*, (1851) 3 H. L. C.

a malicious motive in the publication. "Malice proved to exist at the time of the trial but connected with the subject-matter of it, may well be believed to have existed at the time of speaking the words" (a). However, merely to put a plea of justification on the record is perfectly consistent with good faith, and will, therefore, afford no evidence of malice (b).

General lack
of good faith.

In *Jackson v. Hopperton* (c) the plaintiff had been in the defendant's service. He charged her with stealing some money but did not dismiss her. She subsequently left his service on another ground. He offered to take her back and say nothing about the money. He also offered to give her a character if she would confess the theft. This she refused to do, and subsequently, in answer to inquiries, he again asserted the charge. It was held that there was a general lack of good faith about his conduct, which entitled the jury to consider that his real motive was spite at the plaintiff's leaving his employment, and not a desire to give proper information.

Slight
evidence
suffices
in case of
volunteered
communications.

If a defamatory publication is made, not in the interest of the party himself nor in the discharge of a special duty, nor in pursuance of any invitation, the motives by which it was prompted are generally more or less open to suspicion. Slight evidence of malice, therefore, will suffice in the case of an officious and purely voluntary communication (d). Where the defendant, after appearing against the plaintiff in a county court, spontaneously sent a report of the proceedings to a newspaper, this was held sufficient to justify a finding of malice; the evidence of a bad motive was small, but the probability of a good motive was smaller (e).

Liability of
corporation
for malice.

The question whether the malice of an agent will render a corporation liable for a libel published on a privileged occasion is discussed elsewhere (f).

Damages.

In applying the general principles of the law of damages to actions of defamation, there are certain special considerations

(a) *Per Cur.*, *Simpson v. Robinson*,
(1848) 12 Q. B. p. 514.

Ry. 101.

(b) *Wilson v. Robinson*, (1845) 7 Q. B.
68.

(c) *Sterens v. Sampson*, (1879) 5
Ex. D. 53.

(c) (1864) 16 C. B. N. S. 829.

(f) *Citizens Life Assurance Co. v. Brown*, (1904) A. C. 423. And see above,

(d) *Pattison v. Jones*, (1828) 3 M. &

pp. 60-61.

which require discussion. This is a kind of action, as already pointed out, in which (except in some kinds of slander) no proof of actual damage is necessary. The plaintiff, therefore, need only lay before the jury the words or writing of which he complains, and leave them to say to what amount of compensation he is entitled from the mere fact of such imputations having been made (a). The general damages, however, may be aggravated by evidence of the circumstances of the publication, of the conduct of the defendant with reference thereto, and of the effect which it has actually produced. Aggravation.

The extent of the damage which defamatory matter may cause must clearly depend to a great degree upon the extent of the publicity given. It is one thing for a man to be libelled in a private letter read by a single correspondent, another for him to be held up to the hatred, contempt, or ridicule of the general public in a newspaper or placard. Therefore, even though the defendant in his pleadings admit the publication, the plaintiff is nevertheless entitled to prove its manner and extent (b). If a libel has appeared in a newspaper, the plaintiff is not confined to the damage likely to have been caused by the publication of the particular copy which he gives in evidence, but may also invite the jury to consider the extent to which copies have been multiplied and circulated. "In order to show the extent of the mischief that may have been done to the plaintiff by a libel in a newspaper, you have a right to give evidence of any place where any copy of that libel has appeared, for the purpose of showing the extent of the circulation" (c). Extent of publication.

"The spirit and intention of the party publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff" (d). It is more grievous to be defamed out of personal spite and ill-will than through mere lack of proper care and consideration. In the former case there is insult as well as injury. The malice which aggravates damages is not merely the absence of right motive, as in the case of privilege, but the presence of some bad motive. The jury may even take into con- Spirit and intention.

(a) *Tripp v. Thomas*, (1824) 3 B. & C. 427.

(b) *Vines v. Serell*, (1835) 7 C. & P. 163.

(c) *Per Pollock, C.B., Gathercole v. Miall*, (1846) 15 M. & W. p. 331.

(d) *Per Cur.*, *Pearson v. Lemaitre*, (1843) 5 M. & G. p. 720.

sideration the malicious conduct of the defendant subsequent to the publication, as evidence of the spirit in which the publication was made (a).

It will be a matter of aggravation if the defendant has persistently and deliberately given publicity to the defamation complained of (b), if he has on other occasions disparaged or assailed the plaintiff's reputation, if in his conduct of the litigation he has shown a spirit of determined hostility, has persisted in unfounded imputations and introduced new ones (c). The plaintiff is not precluded from giving other acts of the defendant in evidence to prove malice, by the fact that they are in themselves causes of action, but the jury should be cautioned to treat them, not as independent heads of damage, but only as mere matters of aggravation (d).

Actual
damage.

A plaintiff is entitled to damages by reason of the mere probability that consequences injurious to him may ensue from the defamation, but he may strengthen his case by proving that such consequences have in fact ensued. If, for instance, he has been held up to ridicule in a newspaper, he may show that this has led to his being laughed at by particular persons (e). Similarly, a tradesman, of whom a widely-circulated libel has been published, may prove a general falling off of custom, even though he does not allege it in his pleading (f). Thus, where a shipowner was libelled in a newspaper in respect of his management of one of his vessels and claimed no special damage, he was allowed to give in evidence the amount to which the profit of the next voyage had fallen below the average (g). But in such cases

(a) *Praed v. Graham*, (1889) 24 Q. B. D. 53.

(b) *Delegall v. Highley*, (1837) 8 C. & P. 444; *Plunkett v. Cobbett*, (1804) 5 Esp. 136.

(c) *Per Cockburn, C.J., Risk Allah Bey v. Whitehurst*, (1868), 18 L. T. N. S. p. 620; *per Cockburn, C.J., Blake v. Stevens*, (1864) 4 F. & F. p. 240. It is said in *Worne v. Chadwell*, (1819) 2 Stark. 457, that if other libels are given in evidence by the plaintiff to prove malice, the defendant may justify such libels. Great practical inconvenience would attend such a rule. See below,

p. 624.

(d) *Per Cur.*, *Pearson v. Lemaitre*, (1843) 5 M. & G. p. 720. See, however,

Darby v. Ouseley, (1856) 1 H. & N. 1.

(e) *Cook v. Ward*, (1830) 6 Bing. 409; see *Goslin v. Corry*, (1844) 7 M. & G. 342.

(f) *Harrison v. Pearce*, (1858) 32 L. T. O. S. 298; *Bluck v. Loring*, (1885) 1 Times L. R. 497. In some cases proof of loss of professional income, or falling off of business, is essential to maintenance of action: *Dockerrell v. Dougall*, (1899) 80 L. T. 556.

(g) *Ingram v. Lawson*, (1840) 6 Bing.

the plaintiff gives the evidence in question merely for the purpose of emphasising the fact that that has actually happened which the law would presume without proof. "It is not special damage, it is general damage resulting from the kind of injury he has sustained" (a). He may also prove special or consequential damage, provided he claims it in his pleading, but not otherwise (b).

From the nature of things the special or consequential damage must almost invariably be connected with the defamation by the intervening act of some third person (c). A. defames B. to C., and C. thereupon acts in a manner which causes damage to B. The act of C., under such circumstances, may be perfectly lawful. He may be a customer of B., and cease to deal with him, or he may impose more onerous terms on him (d), or being his employer may give him due notice to quit (e). It may, though unlawful in fact, be lawful on the assumption that the charge made by A. is true, as, for instance, if C. be the employer of B. and dismiss him without notice on a false charge of dishonesty. Finally, the act of C. may be unlawful even supposing the charge is true. In the first two cases A. is liable for the consequences (f), but in the third he is not, for the law does not recognise it as natural that any one should knowingly do what is illegal (g).

Special damage.
Acts of third persons.

A frequent consequence of the publication of a slander is that it is repeated to other people by those to whom it is first published. Upon the question whether the original utterer of the slander is liable for damage ensuing from its repetition, the following rules seem to be established by the cases:—

Repetition, when defendant liable for.

1. Where the slander was intended to be repeated, as where it

Where repetition intended.

N. C. 212; overruling in effect *Delegall v. Hightley*, (1837) 8 C. & P. 444.

(a) *Per* Pollock, C.B., (1858) 32 L. T. O. S. 298.

(b) *Bluck v. Lovering*, (1885) 1 Times L. R. 497.

(c) In *Allsop v. Allsop*, (1860) 5 H. & N. 534, it was attempted to prove illness resulting from defamation as a special damage, but it was held not a natural consequence.

(d) *Alcott v. Millar's Karri and Jarrah*

Forests, Ltd., (1905) 91 L. T. 722, C. A.

(e) As to when damage in this case is too remote, see *Speake v. Hughes*, (1904) 1 K. B. 138, C. A.

(f) *Newman v. Zachary*, (1646) Aleyn, 3; *Davis v. Gardiner*, (1593) 4 Rep. 16 b; *per* Lord Campbell, *Lynch v. Knight*, (1861) 9 H. L. C. pp. 590-1: explaining *Vicars v. Wilcocks*, (1806) 8 East. 1.

(g) *Lynch v. Knight*, (1861) 9 H. L. C. 577.

is told to a notorious tale bearer and tattler with the very hope that its circulation in the neighbourhood will be thereby secured (a), the original utterer will be responsible for the repetition although he did not in fact authorise it (b). He cannot be heard to say that the damage resulting from such repetition is too remote. The case of *Parkes v. Prescott* (c) may seem at first sight opposed to this view. Defamatory statements having been made against the plaintiff at a Board of Guardians, the defendants used various expressions indicating a desire that the reporters present should publish these statements in the local press, and they were in consequence published. The defendants were sued, not in respect of the original slanders, which were not actionable, but in respect of the libels which appeared in the newspapers, and the majority of the Court held that there was evidence to fix them with liability as the publishers of such libels, adding, however, "that loose expressions of a mere wish or hope that proceedings should be published would not be sufficient to fix liability on the defendants in cases like the present" (d). Here, however, the decision was on the question of authority, not on the question of intention. It was clearly necessary to show that the defendants were parties to the wrongful act alleged, since otherwise they could not be liable at all: but if a wrongful act is once proved against a man he may be liable for consequential acts to which he is not a party, provided such acts have naturally followed.

Many cases might be put in which the intention of the defendant would be a material element. Suppose A. should receive a scandalous anonymous letter. He shows it to B., expressing his intention of horse-whipping the writer if he can be discovered. B. hoping and intending that A. will carry out his threat, falsely and maliciously says that the letter is in the writing of C., and A. thereupon assaults C. It is apprehended

(a) Lady Sneerwell: "Did you circulate the report of Lady Brittle's intrigue with Captain Boastall?"

Snake: "That's in as fine a train as your ladyship could wish. In the common course of things I think it must reach Mrs. Clackitt's ears within four-and-twenty hours; and then, you know,

the business is as good as done." *School for Scandal*, act 1, sc. 1.

(b) *Per Lopes, L.J., Speight v. Gurney*, (1891) 60 L. J. Q. B. p. 233; *per Bowen, L.J., Ratcliffe v. Evans*, (1892) 2 Q. B. 530.

(c) (1869) L. R. 4 Ex. 169.

(d) *Ibid.*, p. 177.

that, though ordinarily an illegal act is not a natural consequence, B. ought in this case to be liable to C. for the damage caused by the assault, insomuch as it was a result he intended (a).

2. Where the slander is uttered under circumstances under which it is *a priori* probable that it will be repeated, the original slanderer will be liable for the repetition although not in fact intended. For the purpose of determining what those circumstances are which will render repetition probable, the most important element to take into consideration is the number of persons to whom the original slander is published.

Where repetition antecedently probable.

(a.) Where the slander is published to a single person, it is (in the absence of circumstances which would render the repetition privileged) unlikely to be repeated, and therefore if it be in fact repeated, the original slanderer will not in general be liable for the consequences of the repetition. Thus in *Ward v. Weeks* (b), the defendant said to a single person, named Bryce, that the plaintiff was a rogue and swindler. Bryce repeated it to one Bryer, who, in consequence ceased to deal with the plaintiff. It was held that the defendant was not liable. So in *Dixon v. Smith* (c), where the defendant told an individual patient of the plaintiff, who was a surgeon, that the plaintiff had been guilty of incontinence, and the plaintiff claimed, not only for loss of that patient's custom, but also for a general falling off of custom, it was held that he could not recover for the latter, because it must have been the result of repetition, and such repetition was not under the circumstances the natural consequence of the slander.

Slander published to single person.

The same rule would seem to apply to a libel contained in a private letter. The writer of a libellous letter is *prima facie* not answerable for any damage which may result if his correspondent shows the letter to a third party. No doubt in *Ratcliffe v. Evans* (d) Bowen, L.J. says generally: "In the case of a personal libel, general loss of custom may unquestionably be alleged and proved." But it is evident from the context that he was

Repetition of contents of private letter.

(a) See above, p. 143, and observations there on *Chamberlain v. Boyd*, (1883) 11 Q. B. D. 407.

(b) (1830) 7 Bing. 211.

(c) (1860) 5 H. & N. 450; and see *Ayre v. Craven*, (1834) 2 A. & E. 2.

(d) (1892) 2 Q. B. p. 529.

there referring to libels published in newspapers or other widely-circulated documents, and not to a libel contained in a private letter (a).

Slander published to several persons.

(b.) Where the slander is published in the hearing of *several persons*, it is not improbable that it will be repeated, and in such case the defendant will be responsible for the repetition. Thus in *Evans v. Harries* (b) where a slander of a publican in the way of his trade was uttered in his public-house "in the presence and hearing of divers customers" the plaintiff was allowed to give evidence of a general diminution of profits, although such diminution might well have been due to a withdrawal of custom by persons other than the defendant's immediate audience. Similarly in *Riding v. Smith* (c) where the slander was uttered in the presence of three or more persons while on their way to church upon a public occasion, it was held that general loss of custom might be proved.

Where there is a duty to repeat.

8. Even where the slander is published only to a single person, and the defendant does not intend it to be repeated, he is nevertheless responsible if the hearer owes it as a duty to some one else to repeat to him what he has heard. For instance, where a husband, being informed that the plaintiff, a milliner with whom his wife was in the habit of dealing, was unchaste, told his wife, who withdrew her custom (d); where a slander was spoken of a constable in the presence of a police inspector, who in the discharge of his duty reported it to his superior officers, whereby the constable was dismissed from the force (e); in both cases the original slanderer was held liable.

Mitigation of damage.

It is permissible to a defendant to seek to mitigate the damages to be awarded against him, by proving circumstances which show that he did not act with deliberate malice, or by impeaching the general reputation of the plaintiff. In certain cases he may

(a) The *dictum* of Grove, J., in *Clarke v. Morgan*, (1877) 38 L. T. N. S. p. 355, that a plaintiff in an action of slander "may give general evidence of damage, which must in most cases have been caused by the repetition of the slander," without regard to the question whether the original slander was published to one person or many, must be regarded

as bad law.

(b) (1856) 1 H. & N. 251.

(c) (1876) 1 Ex. D. 91.

(d) *Derry v. Handley*, (1867) 16 L. T. N. S. 263.

(e) See *per* Lord Denman, C.J., in *Adams v. Maltby*, (1842) Car. & M. p. 408.

prove that compensation has already been obtained for what is substantially the same injury. When the plaintiff seeks to recover special damage the defendant may rely on any facts which tend to disprove the connection between the defamation and the consequential injury alleged.

(a.) It is a mitigating circumstance if the publication of defamatory matter takes place under circumstances of strong provocation. Such provocation must, however, be *in pari materia* with the retaliation. It would not be available in mitigation of damages in an action of defamation to prove that the plaintiff had previously assaulted the defendant. It was formerly considered that one libel could not be considered as excusing another unless they both referred to the same subject-matter (a). The rule, however, appears now to be relaxed, and it is sufficient if the circumstances are such as to raise a fair presumption that the first defamation provoked the second (b). If two men set to work to libel each other, neither can have a claim for substantial damages (c).

A difficulty arises with regard to the admission in evidence of libels on the defendant published by the plaintiff, for if they are introduced, the latter, it would seem, ought in justice to be allowed to explain the circumstances attending their publication, to show that they were true or privileged: and this would involve the raising of a multiplicity of cross issues (d).

It is clear that nothing can be said to be a provocation which does not come to the knowledge of the person provoked. It is not, therefore, sufficient for the defendant to show merely that libels have been published of him by the plaintiff (e).

(b.) It seems to be considered a less malicious act to repeat than to originate a defamatory statement. Thus, in one case a defendant was allowed to prove that he had copied the libel, which

Mere
repetition.

(a) *May v. Brown*, (1824) 3 B. & C. 113; *Tarpley v. Blabey*, (1836) 2 Bing. N. C. 437.

(b) *Per Denman, C.J., Moore v. Oastler*, (1836) 1 Moo. & R. 451 n. See *Watts v. Fraser*, (1837) 7 A. & E. 223.

(c) *Per Mansfield, C.J., Finnerty v. Tipper*, (1809) 2 Camp. p. 77.

(d) In *May v. Brown*, (1824) 3 B. & C. C.T.

113, Lord Tenterden allowed it to be asked generally, whether the plaintiff had libelled the defendant, but rejected evidence of particular libels. A general question of the same kind was rejected in *Wakley v. Johnson*, (1826) Ry. & Moo. 422. See above, p. 619.

(e) *Watts v. Fraser*, (1837) 7 A. & E. 223.

was the cause of action, from another publication, and had softened it in the process (a). In most of the cases, however, it is said that evidence of such a kind is not admissible, unless it appear on the face of the defamatory publication that it is a mere repetition, and the original authority be disclosed (b). The not very satisfactory reason for this rule would seem to be, that if a party defamed knows the person who originally attacked his character, he ought to proceed against him, and not against those who have merely handed on the scandal (c).

Apology.

Apology in
public press.

(c.) It has been held in an action for slander against a husband and wife, that an apology by the latter is not admissible as evidence, for the plaintiff, against the former (d). By 6 & 7 Vict. c. 96, s. 2, it is provided that in an action for libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or periodical publication without actual malice and without gross negligence, and that before the commencement of the action, at the earliest opportunity, he inserted in such newspaper or other periodical publication a full apology for the said libel, or if the newspaper or periodical publication in which the libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action (e).

(a) *Creevy v. Carr*, (1835) 7 C. & P. 64; see too *Mullett v. Hulton*, (1803) 4 Esp. 247; *Bennett v. Bennett*, (1834) 6 C. & P. 588; *East v. Chapman*, (1827) 2 C. & P. 570; *Duncombe v. Daniell*, (1837) 2 Jur. 32; but see *Talbutt v. Clark*, (1840) 2 Moo. & R. 312.

(b) *Mills v. Spencer*, (1817) Holt, 533; *Richards v. Richards*, (1844) 2 Moo. & R. 557; see, however, *Saunders v. Mills*, (1829) 6 Bing. 213.

(c) The rule may perhaps be a survival of the doctrine laid down in one of the resolutions in *The Earl of Northampton's Case*, (1612). "In a private action for the slander of a common person if J. S. publish that he hath heard J. N. say that J. G. was a

traitor or thief; in an action of the case, if the truth be such, he may justify" (12 Rep. p. 134). It is quite certain, however, that the resolution and the notion underlying it are altogether exploded. See *De Crespigny v. Wellesley*, (1829) 5 Bing. 392; *McPherson v. Daniels*, (1829) 10 B. & C. 263; *Tidman v. Ainslie*, (1854) 10 Ex. 63.

(d) *Tait v. Beggs*, (1905) 2 Ir. R. 325.

(e) The section went on to provide for payment into Court, but this part is repealed (42 & 43 Vict. c. 59), being rendered unnecessary by the general provisions as to payment into Court in all cases; and see *Lafone v. Smith*, (1858) 3 H. & N. 735.

The first section of the same Act enables an offer of an apology to be pleaded in mitigation in all actions of libel.

(d.) A plaintiff who brings an action of defamation puts his reputation in issue. If he has none to lose, attacks on his character cannot have really injured him and cannot, therefore, entitle him to substantial damages. A defendant consequently may give evidence of the plaintiff's general bad reputation in respect of the subject-matter of the publication in question. It is, of course, immaterial, if the cause of action be an imputation of drunkenness, to show that the plaintiff is reputed dishonest. The evidence of reputation must be strictly general. If a particular act of misconduct is imputed it is not permissible to suggest that he has been guilty of similar misconduct on other occasions or has been charged with or suspected of such misconduct (a). It is to be observed that there are some cases in which the fact that a plaintiff is of bad reputation may have the effect of aggravating the injurious character of a defamatory statement. Thus an imputation of insolvency may serve to ruin a trader whose credit is tottering, while it would have no effect on a man of firmly-established commercial reputation.

Bad reputation of plaintiff.

(e.) In ordinary cases where libels or slanders of the same effect and against the same person are published in more than one quarter, each publication is to be considered separately, and the jury are to say what damage they attribute to it (b). It is not, however, within the province of the jury to sever the damages, by allocating the particular proportions of a lump sum among the various tortfeasors (c) although the measure of damages is the aggregate of the injury received from all (d). If A. and B. both published similar libels against C., and C. recovers damages against A., and then sues B., B. cannot prove the damages recovered against A. as a mitigation of the damages recoverable against himself, because the supposition is that the injuries are

Damages recovered for similar libel.

(a) See the judgment of Cave, J., in *Scott v. Sampson*, (1882) 8 Q. B. D. pp. 498 *sqq.*, where all the authorities are collected.

(c) *Dawson v. McClelland & Others*, (1899) 2 Ir. R. 486; see also *Brown v. Allen & Another*, (1802) 4 Esp. 157.

(b) *Harrison v. Pearce*, (1858) 1 F. & F. 567.

(d) *Clark v. Newsam*, (1847) 1 Ex. 131; Alderson, B., at p. 140.

distinct and the damages distinct. Practically however the result is that a man may be compensated half a dozen times over for what is in truth but one wrong. However, as regards newspapers, it is now enacted that "at the trial of any action for a libel contained in any newspaper, the defendant shall be at liberty to give in evidence in mitigation of damages that the plaintiff has already recovered (or brought actions for) damages, or has received, or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought" (a).

Negating
special
damage.

(f.) Where a plaintiff alleges that in consequence of being defamed by the defendant he has suffered special damage, it is always open to the latter to suggest that the damage in question is attributable to other causes. If a customer be called to prove that he has ceased to deal with the plaintiff in consequence of the defendant's imputations, he may be asked if he did not act also on other reports which reached him, and what those reports were (b). If a plaintiff has suffered a general loss of custom and has been defamed in more than one quarter, the jury must consider the probabilities of the case and make such apportionment of the loss as they can (c).

(a) 51 & 52 Vict. c. 64, s. 6. In s. 5 of the same Act are contained provisions for the consolidation of actions for libel, where the publications sued on are substantially the same.

(b) *King v. Watts*, (1838) 8 C. & P. 614. See too *Hopwood v. Thorn*, (1849)

8 C. B. 293.

(c) *Harrison v. Pearce*, (1858) 1 F. & F. 567. It has been held that on a statement of special damage by loss of custom the customers themselves must be called; *Barnett v. Allen*, (1858) 1 F. & F. 125.

Canadian Notes to Chapter XVII.

DEFAMATION.

The logical ingenuity that characterises the English law of defamation has been carried into the law of the English-speaking provinces of Canada. As might be expected, this ingenuity has here and there led to decisions that are far from being obvious matters to the layman, who would certainly think that to write a letter calling his neighbour an "S. B." (a) were surely a greater offence than to express his views as to the disinterestedness of

(a) See *Major v. McGregor*, 5 O. L. R. 81.

a lawyer (a). It requires a highly trained legal intellect to distinguish between mere coarse abuse and genuine defamation.

LIBEL ON A MAN IN HIS OFFICE (b).

Words charging a person with violating a public trust are words libellous *per se*, and do not require connection with any particular office; an office may be introduced as an explanatory circumstance (c). Ontario.

A statement that the defendant felt it to be an imposition practised by plaintiffs on the public in charging such exorbitant prices was held libellous (d).

A written paper charging an attorney with being governed entirely by a craving after his own gains, without regard to the interest of his clients and reckless of bringing them to ruin, is libellous (e). New Brunswick.

LIBEL: IMPUTING INSOLVENCY TO TRADER (f).

Reports of a mercantile agency (g) and messages sent by a telegraph company (h) imputing insolvency in a trader are actionable.

Mercantile agencies in regard to their business publications do not appear to be in a better case than other members of the community, their qualified privilege not extending to a publication of libellous matter to all their subscribers indiscriminately (i).

IMPUTING CRIMINAL OFFENCE (k).

Words that impute an offence under the Criminal Code are actionable *per se*. Thus, where the defendant said of plaintiff, "He is a bad man with the women; he drugged Mrs. A. M.," the words were held actionable *per se* as imputing an offence under ss. 245, 246 (now 277, 278), of the Criminal Code (l). Nova Scotia.

(a) See *Andrews v. Wilson*, 3 Kerr, 86. *supra*.

(b) P. 553, *supra*; see also p. 557.

(c) *Jones v. Stewart*, Tay, 453; cf. *McLay v. County of Bruce*, 14 O. R. 398.

(d) *Ontario Copper Lightning Rod Co. v. Hewitt*, 30 U. C. C. P. 572, notwithstanding the fact that the plaintiffs sold lightning rods.

(e) *Andrews v. Wilson*, 3 Kerr, 86.

(f) P. 553, *supra*; see also p. 557,

(g) *Consette v. Dun*, 18 S. C. R. 222; cf. *Lion Brewery Co., Ltd. v. Bradstreet Co.*, 9 B. C. R. 435.

(h) *Dominion Telegraph Co. v. Silver*, 10 S. C. R. 238.

(i) *Todd v. Dun*, 15 A. R. 85; *Robinson v. Dun*, 24 A. R. 287; *Lemay v. Chamberlain*, 10 O. R. 638.

(k) P. 555, *supra*.

(l) *Gamble v. Hirschfield*, 26 N. S. R. 469.

SLANDER OF A MAN IN HIS OFFICE OR TRADE (a).

Ontario. Words that the plaintiff had cheated the defendant in weight were held a slander of the plaintiff in his business (b).

CALLING RELINQUISHED (c).

Ontario. A medical practitioner registered in Great Britain, but not in this province, cannot maintain an action against a person slandering him in his profession (d).

SLANDER: IMPUTING INSOLVENCY TO TRADER (e).

Ontario. Where the words used cast an imputation on the solvency and financial standing of the plaintiff, it is for the jury to say whether they were spoken in reference to his business and calculated to injure him therein (f).

MISCONDUCT OF CLERGYMAN (g).

Ontario. The absurdities of the English law are faithfully reproduced in the decisions of our Courts. Thus it has been held not actionable (without special damage) to say of a Church of England clergyman, "He will get drunk; I have seen him drunk" (h), or to say of a Methodist preacher that he kept company with a prostitute and defendant could prove it (i).

But it has been held actionable to use words imputing incest to a Methodist paid preacher or lay exhorter on the ground that the tendency of the slander is to occasion the loss of plaintiff's employment or office, even though it was not spoken with reference to the office (k).

INNUENDO: FUNCTIONS OF JUDGE AND JURY (l).

Ontario. The evidence required to be adduced by the plaintiff before his case will be submitted to the jury is discussed in the case of

(a) P. 557, *supra*; see also p. 553, 423.
supra.

(b) *Marsden v. Henderson*, 22 U. C. R. 585. See *Fellowes v. Hunter*, 20 U. C. R. 382, as to allegation of cheating by a real estate dealer; *Sloman v. Chisholm*, 22 U. C. R. 20, finding by jury that words spoken of plaintiff in the way of his trade; *Allman v. Kenzel*, 3 Ont. P. R. 110, slander of wife of tradesman.

(c) P. 558, *supra*.

(d) *Skirring v. Ross*, 31 U. C. C. P.

(e) P. 560, *supra*; see also p. 553, *supra*.

(f) *Lott v. Drury*, 1 O. R. 577.

(g) P. 561, also p. 558, *supra*.

(h) *Tighe v. Wicks*, 33 U. C. R. 479.

(i) *Breeze v. Sails*, 23 U. C. R. 94.

(k) *Starr v. Gardner*, 6 O. S. 512: but see *Palmer v. Solmes*, 30 U. C. C. P. 481; S. C. 45 U. C. R. 15, as to incest not being cognisable offence.

(l) P. 562, *supra*.

Major v. McGregor (a). This case is of peculiar interest to those Ontario. who affect strong Anglo-Saxon colloquialisms. The defendant, in a postcard, used the letters "the S. B." with reference to the plaintiff. The innuendo was that the letters "S. B." meant son-of-a-bitch. Britton, J., said: "Can the plaintiff, relying on the fact of publication, accept the postcard, determine for himself what the letters mean, and, without evidence that any other person so understood them, have his case submitted to a jury? I do not think he can."

Where words fairly admit two meanings, it is proper to leave Manitoba. it to the jury to say in which sense they were uttered (b). Whether an alleged libel has the meaning ascribed to it is a question for the jury, and if the question is not considered by the jury a new trial will be ordered (c).

In a case which turns on whether the defamatory matter was Nova Scotia. used in the sense set out in the innuendo, it is for the judge to tell the jury whether the words used were capable of the construction put on them by the plaintiff, and to leave it to the jury whether the words were in fact used with such meaning (d).

LANGUAGE *PRIMÂ FACIE* DEFAMATORY (e).

The word "blackmailing" is libellous *per se* (f).

Ontario.

The epithet "blackleg" is libellous (g).

British
Columbia.

"A d——d parcel of robbers" are words actionable in themselves (h).

New
Brunswick.

If words *primâ facie* imputing felony are used in a different sense they are not actionable. Thus a charge of stealing may in some cases be taken to be merely a charge of trespass (i).

The word "rebel" is not actionable unless it is used in a treasonable sense (k).

To write of a man that his outward appearance is more like an assassin than an honest man is not libellous (l).

(a) 5 O. L. R. 81; 6 O. L. R. 528. The judge (Britton, J.) further thought that the words in their expanded form are "words of abuse, but are, as often used, absolutely meaningless."

(b) *Cameron v. Overend*, 1 West. L. R. 545 (1905), Richards, J., following *Ritchie v. Seaton*, 64 L. T. 210; *Simmons v. Mitchell*, 6 App. Cas. 156.

(c) *Martin v. Free Press*, 8 M. L. R. 50; 21 S. C. R. 518: but see *Higgins v. Walken*, 17 S. C. R. 225.

(d) *Ray v. Corbett*, 4 R. & G. 407.

(e) P. 564, *supra*.

(f) *Macdonald v. Mail Printing Co.*, 2 O. L. R. 278.

(g) *Hugo v. Todd*, 1 B. C. R., Pt. II., 369.

(h) *Hea v. McBeath*, 2 Kerr, 301. See *Carrill v. McLeod*, 4 All. 332; *Connick v. Wilson*, 2 Kerr, 496, 617.

(i) *Herrington v. McBay*, 29 N. B. R. 670.

(k) *Beardsley v. Dibbler*, 1 Kerr, 246.

(l) *Lang v. Gilbert*, 4 All. 445.

LANGUAGE *PRIMA FACIE* INNOCENT (a).British
Columbia.

A poster issued by a debt collector showing accounts with the following heading, "Accounts for Sale, Victoria, B.C. The British Columbia Commercial Agency offer the following accounts for sale at their office," was held libellous, the innuendo being not merely that the plaintiff was justly indebted in the sum mentioned, but that he was either dishonest or insolvent (b).

PUBLICATION (c).

Ontario.

Publication to one's stenographer may be sufficient to destroy a qualified privilege (d).

PUBLICATION: LETTER OPENED BY THIRD
PERSON (c).

Ontario.

Jackson v. Staley is an amusing case of publication by sending an envelope enclosing an account to an illiterate plaintiff with items like the following: "Stole hay during winter, \$4.00." There being no evidence that defendant knew the plaintiff could not read, it was held that there was no evidence of publication (f).

JUSTIFICATION (g).

Ontario.

Justification is a somewhat dangerous defence, as pleading it and *attempting to prove it* may be taken as some evidence of malice and an aggravation of the injury (h).

JUDICIAL PROCEEDINGS (i).

Nova
Scotia.

A letter written to a magistrate, not *qua* magistrate, but in his capacity as a broker or agent for collection, would not be privileged (k).

OFFICIAL COMMUNICATIONS TO SUPERIORS (l).

Ontario.

Where one clerk spontaneously told his principal that another clerk had robbed him, it was held not privileged (m).

(a) P. 565, *supra*.(b) *Wolfenden v. Giles*, 2 B. C. R. 279.(c) P. 568, *supra*.(d) *Puterbaugh v. Gold Medal Furniture Manufacturing Co.*, 7 O. L. R. 582.(e) P. 572, *supra*.(f) *Jackson v. Staley*, 9 O. R. 334.(g) P. 573, *supra*.(h) *Faucitt v. Booth*, 31 U. C. R. 263: see *Corridan v. Wilkinson*, 20 A. R. 184.(i) P. 577, *supra*.(k) *Louther v. Baxter*, 22 N. S. R. 372.(l) P. 579, *supra*.(m) *Prentice v. Hamilton*, Dn. 398.

OFFICIAL COMMUNICATIONS GENERALLY (a).

The detection of irregularities in the Post Office often leads to communications that require to have the veil of privilege cast over them (b).

PRIVILEGE: FUNCTIONS OF JUDGE AND JURY (c).

It is the function of the judge to determine whether the **Ontario** occasion was privileged, and if privileged, in the absence of evidence of malice, there is nothing to be left to the jury as to *bona fides* or otherwise (d).

MALICE (e).

It having been decided that the occasion is privileged, the older **Ontario** cases hold that actual malice (of a rather formal type) must be proved extrinsically to the communication (f). But from a more recent case it appears dangerous for a judge to attempt to define malice, and safer to leave it to the jury to say whether the defendant acted through a wrong feeling in his mind against the plaintiff—some unjustifiable intention to do him wilful injury (g).

Generally the defendant's knowledge of the falsity of a statement is evidence of malice (h); but not so his pleading justification and *not attempting to prove it* (i).

QUALIFIED PRIVILEGE DESTROYED BY
EXAGGERATED LANGUAGE (k).

The case of *Fryer v. Kinnersley* (l), which the authors of the **Ontario** text consider no longer law, has been followed in the Upper Canada case of *Graham v. Crozier* (m).

CONFIDENTIAL RELATIONSHIP (n): TRADE
ASSOCIATION.

A communication by the secretary of a trade association to the

(a) P. 579, *supra*.

(b) See *Deus v. Waterbury*, 6 S. C. R. 143, case of inspector calling in assistant postmaster and then in his presence charging clerk with theft:—Held privileged. See also *Hanes v. Burnham*, 26 O. R. 528; 23 A. R. 90; *Jones v. Stewart*, Tay, 453.

(c) P. 581, *supra*.

(d) *McIntree v. McCulloch*, 2 E. & A. 390, reversing 13 U. C. C. P. 438.

(e) P. 582, *supra*.

(f) *Richards v. Boulton*, 4 O. S. 95; *McIntyre v. McBean*, 13 U. C. R. 534.

(g) *English v. Lamb*, 32 O. R. 73.

(h) See *Beaulieu v. Cochrane*, 29 O. R. 151, 598.

(i) *Corridan v. Wilkinson*, 20 A. R. 184; see *Faucitt v. Booth*, 31 U. C. R. 263.

(k) P. 583, *supra*.

(l) See p. 583, footnote (g).

(m) 44 U. C. R. 378, case of letter written to M.P. denouncing a "scoundrel" of a postmaster; cf. the New Brunswick case, *Bolser v. Croseman*, 25 N. B. R. 556.

(n) P. 587, *supra*.

members that plaintiff was unworthy of credit was held privileged on the ground of interest, and the privilege held to include the publication to the copyist of the circular (a).

PRIVILEGE OF PETITION (b).

Ontario. An action for libel contained in communications to the Government with a view of obtaining redress cannot be sustained unless the party making them acted maliciously and without probable cause (c).

A petition to license commissioners against a license has been held not absolutely privileged, but that the onus lay on the plaintiff to prove malice and wrong motive (d).

FAIR COMMENT (e).

Ontario. It is clear, upon the authorities, that a man may not invent his facts and then comment on them and succeed upon the ground that, the facts being assumed to be true, the comment is fair (f).

British Columbia. The rule about comment has no application to private communications, but only to statements made about public acts or matters of public interest (g).

Manitoba. A writer may not charge a public man with misconduct or impute dishonest motives to him, and then, under a plea of fair comment, bring extrinsic evidence to show that the charge or imputation is true. But if the writer were commenting on the public man's public acts or conduct he may prove the facts on which he based his comment, and if the proof of these facts satisfied the jury that the inferences the defendant has drawn are not unfair or malicious, then they are entitled to say that they are fair comment and not libellous (h).

New Brunswick. To bring a case within the privilege of being *bonâ fide* comment on a matter of public interest the comment "must be comment on admitted facts or facts proved to be true, or comments on facts involved in a report of proceedings the publication of which would be privileged. This (*referring to the matter in dispute*) is an allegation, not a comment" (i).

(a) *Harper v. Hamilton Retail Grocers Association*, 32 O. R. 295; cf. *Puterbaugh v. Gold Medal Furniture Manufacturing Co.*, 7 O. L. R. 582.

(b) P. 595, *supra*.

(c) *Rodgers v. Spalding*, 1 U. C. R. 258.

(d) *Willcocks v. Howell*, 5 O. R. 360.

(e) P. 604, *supra*.

(f) *Crow's Nest Pass Coal Co. v. Bell*, 4 O. L. R. 660.

(g) *Williams v. Morris*, 4 West. L. R. 99, *per* Hunter, C.J.

(h) *Martin v. Free Press*, 8 M. L. R. 50; 21 S. C. R. 518.

(i) *McDonald v. Sydney Post Publishing Co.*, 1 East. L. R. 61 (1906), *per* Graham, E.J.

PUBLIC INTEREST IN SUBJECT-MATTER (a).

The conduct of a solicitor for a municipal corporation is a Ontario matter of public interest (b).

LOCAL ADMINISTRATION (c).

It has not been held that the administration of a prison is not Ontario a matter of public and general interest. But in one case the publication in question—being letters grossly reflecting on the warden—was held not a fair comment upon a matter in which the public had an interest (d).

PRIVILEGE DESTROYED BY MALICE (e).

If a party on a privilege doccasion speak or write what is Nova untrue to his knowledge, this is evidence of malice sufficient to Scotia. destroy the privilege of the occasion (f).

SPECIAL DAMAGES (g).

When special damages (in the way of loss of business) are Manitoba. claimed, the names of the customers whose business has been lost must be set out (h).

The customers should be called as witnesses to testify that New they had refused to deal with the plaintiff in consequence of the Brunswick. defendant's charge (i).

DAMAGES : MITIGATION OF DAMAGE (k).

The Courts do not favour giving heavy damages in a "mere Nova petty squabble" (l). Scotia.

In a case of slander, Wetmore, J., gave the low amount of \$100 Alberta and costs "because evidently plaintiff's reputation was not Saskatchewan. injured to the slightest degree, and the slander was largely the result of temper in an excitable woman who seemed to have been unable to control her tongue properly" (m).

(a) See p. 607, *supra*.

(b) *Douglas v. Stephenson*, 29 O. R. 616.

(c) P. 607, *supra*.

(d) *Massie v. Toronto Printing Co.*, 11 O. B. 362.

(e) P. 611, *supra*.

(f) *Miller v. Green*, 33 N. S. R. 517 ; 31 S. C. R. 177.

(g) P. 620, *supra*.

(h) *Ashdown v. Manitoba Free Press Co.*, 6 M. L. R. 578 ; 23 S. C. R. 43.

(i) *McCann v. Kearney*, 20 N. B. R. 84.

(k) P. 623, *supra*.

(l) *McLean v. Campbell*, 37 N. S. R. 356.

(m) *Welch v. Smith*, 4 West. L. R. 4 (1906).

PROVOCATION (a).

Ontario. Previous editorial articles attacking the defendant are admissible in evidence in mitigation of damages as furnishing provocation for the alleged libels (b).

BAD REPUTATION OF PLAINTIFF (c).

New Brunswick. In an action of slander for charging the plaintiff with stealing, evidence of the general bad character of the plaintiff is not admissible as evidence in mitigation of damages (d).

Nova Scotia. It is safer to plead that the words were part of an altercation and of mere general abuse than to attempt (and fail) to prove that the plaintiff has a bad reputation (e).

(a) P. 624, *supra*.

(b) *Stirton v. Gummer*, 31 O. R. 227 ;
Percy v. Glasco, 22 U. C. C. P. 521.

(c) P. 626, *supra*.

(d) *Williston v. Smith*, 3 Kerr, 443.
Cf. the Ontario case, *Moore v. Mitchell*,
11 O. R. 21, disapproving *Wilson v.*

Woods, 9 O. R. 687 ; see also *Myers v.*
Currie, 22 U. C. R. 470 ; *Edgar v.*
Newell, 24 U. C. R. 215.

(e) *Croft v. Jodrey*, 28 N. S. R. 7.
costs given as a penalty for attempting
to prove bad character.

CHAPTER XVIII.

MALICIOUS WORDS AND SLANDER OF TITLE.

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WORDS cannot of themselves amount to a direct infringement of any right except that of reputation, and cannot therefore, apart from consequences, give a cause of action except when they are defamatory of the person complaining. They may, however, be the cause of damage to a man in the conduct of his affairs, and such damage may amount to a legal wrong. If property of any kind is for sale, and any one, without lawful motive, comes forward and falsely alleges that any incumbrances, charges, or liabilities exist with respect to it, or otherwise impeaches or cuts down the right or capacity of the vendor to make a good conveyance, and in consequence the bargain goes off, an action lies, which is commonly known under the name of "slander of title."

Words actionable as causing damage.

Slander of title.

This "is not properly an action for words spoken or for libel written or published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title" (a). The precise language used is still, however, a material part of the cause of action, in all cases actual malice being a necessary ingredient in an action for slander of title (b); and where malice is proved, but not otherwise, an injunction may be granted to restrain a slander of title before any actual damage has been sustained (c). In *Gutsole v. Mathers* (d), where the plaintiff simply set out in his declaration the substance of certain misrepresentations as to his title to goods, judgment

(a) *Per Cur.*, *Malachy, v. Soper*, (1836) 3 Bing. N. C. pp. 384-5. *Maison Tulbot*, (1908) 20 T. L. R. 88 : reversed on ground that no evidence of malice had been adduced, (1904) 20 T. L. R. 579, C. A.

(b) *Hargrave v. Le Breton*, (1769) 4 Burr. 2422.

(c) *Dunlop Pneumatic Tyre Co. v.* (d) (1836) 1 M. & W. 495.

was arrested after verdict on the ground that no cause of action appeared on the face of the pleading.

The requisite factors for maintaining an action for slander of title are thus summarised by Lord Davey. "To support such an action it is necessary for the plaintiffs to prove:—

"(a) That the statements complained of were untrue;

"(b) That they were made maliciously—that is, without just cause or excuse;

"(c) That the plaintiffs have suffered special damage thereby" (a).

It may be slander of title to allege of anyone that he is selling goods in infringement of a patent or a copyright (b). By 46 & 47 Vict. c. 57, s. 92, a right of action is given to anyone damnified by wrongful threats of proceedings for infringement on the part of some one claiming to be a patentee (c).

False claim
of lien.

In *Green v. Button* (d) the plaintiff had contracted for the purchase of certain wood, but he was unable to obtain delivery owing to the defendant falsely alleging an agreement under which he had a lien on the goods for monies advanced to the plaintiff, and it was held that there was a good cause of action for slander of title.

Slandering
quality of
goods.

Analogously, it is actionable to disparage the quality of a man's goods and thereby prevent their sale (e).

(a) *Royal Baking Powder Co. v. Wright, Crossley & Co.*, (1901) 18 Pat. Cas. Rep. 95, at p. 99.

(b) See *Wren v. Wield*, (1869) L. R. 4 Q. B. 730; *Dicks v. Brooks*, (1880) 15 Ch. D. 22; *Hart v. Wall*, (1877) 2 C. P. D. 146; but see *Capital & Counties Bank v. Henty*, (1882) 7 App. Cas. 741, Blackburn, J., at p. 777.

(c) The section does not apply where "the person making such threats with due diligence commences and prosecutes an action for the infringement of his patent." As to what will constitute "threats," see *Driffield & East Riding Pure Linseed Cake Co. v. Waterloo Mills Cake & Warehousing Co.*, (1886) 31 Ch. D. 638; *Combined Weighing & Advertising Co. v. Automatic Weighing Machine Co.*, (1889) 42 Ch. D. 665; *Skinner & Co. v. Shew & Co.*, (1893) 1 Ch. 413. As to what is "due diligence,"

see *Colley v. Hart*, (1890) 44 Ch. D. 179. See also *Barrett v. Day*, (1890) 43 Ch. D. 435; *Challender v. Royle*, (1887) 36 Ch. D. 425; *Kensington & Knightsbridge Electric Lighting Co. v. Lane Fox Electrical Co.*, (1891) 2 Ch. 573.

(d) (1835) 2 C. M. & R. 707.

(e) *Western Counties Manure Co. v. Lawes' Chemical Manure Co.*, (1874) L. R. 9 Ex. 218. This principle seems to be assumed in *White v. Mellin*, (1895) A. C. 154, though upon another ground doubts are in that case thrown upon the above-mentioned case; and see *Lindtype Co. v. British Empire Type Setting Co.*, (1899) 81 L. T. 331, H. L. (E.); *Hubbuck & Sons v. Wilkinson, Heywood & Clark*, (1899) 1 Q. B. 86, C. A.; *Allcott v. Millar's Karri & Jarrah Forests, Ltd* (1905) 91 L. T. 722, C. A.

In the old case of *Shepherd v. Bateman* (a), the plaintiff lost her marriage through the defendant falsely and maliciously alleging that she was already married, and it was held that she had a good cause of action. In *Riding v. Smith* (b), the plaintiff, a shopkeeper, lost custom through its being falsely and maliciously alleged that his wife, who assisted in the business, had misconducted herself on his premises, and the Court decided that the action was maintainable. "If a man states of another, who is a trader earning his livelihood by dealing in articles of trade, anything, be it what it may, the natural consequence of uttering which would be to injure the trade and prevent persons from resorting to the place of business and it so leads to loss of trade, it is actionable. It is of little consequence whether the wrong is slander or whether it is a statement of any other nature calculated to prevent persons resorting to the shop of the plaintiff" (c).

Other false statements causing damage.

The effect of these various authorities seems to be that a wrong is committed, and a corresponding remedy given, whenever false statements maliciously made produce, as a natural consequence, damage which is capable of legal estimation.

General effect of cases.

The plaintiff must in the first place strictly prove the words complained of, as in an action for defamation (d). He must prove that they are false, and he must prove that they are malicious (e). The distinction between express and implied malice does not seem to exist in this form of action. There may be something analogous to a claim of privilege on the defendant's part; he may say, for example, that he only slandered the plaintiff's title in defence of his own. In such a case it will be for the plaintiff to prove a lack of good faith. Even, however, should there be no duty or interest on the defendant's part, the matter will not be necessarily concluded against him. Malice must still be found as a fact. That he had no good ground or reasonable occasion for the publication in question may be strong evidence of that fact, but it is nothing more. Finally, actual damage must be proved. It will be seen therefore that an action in the nature

Words must be false and malicious.

Malice must be proved in fact.

Damage.

(a) (1661) 1 Sid. 79.

(b) (1876) 1 Ex. D. 91.

(c) *Riding v. Smith*, (1876) 1 Ex. D. Kelly, C.B., at p. 93; and see *supra*, cases under tit. Defamation.

(d) *Gutsole v. Mathers*, (1836) 1 M. & W. 495.

(e) *Dunlop Pneumatic Tyre Co. v. Maison Talbot*, (1904) 20 T. L. R. 579, C. A.

of slander of title, or as it might perhaps be more properly called an action for malicious words, differs in several points from an action for defamation. It remains to consider these points more in detail.

The words
must be
proved false.

1. In an action for defamation the plaintiff must allege the falsity of the publication in question, but he need not prove it. It is for the defendant to raise the issue, and the burden of proof lies upon him. In an action for malicious words the burden of proof lies upon the plaintiff (a). Where character is at stake the assumption is in favour of the party defamed, but there is no similar assumption in favour of the goodness of a man's title to property or of the quality of his merchandise. Unless he shows falsehood "the plaintiff shows no case to go to the jury" (b). It is true that in one case (c) Lord Ellenborough said it was sufficient if the declaration alleged that the publication in question was "malicious, injurious, and unlawful," without the word "false" being added. He cannot, however, have meant that truth was immaterial, and therefore in all probability merely intended to decide that the falsity was a necessary implication from the other words.

Malice—
absence of
good faith.

2. It has been already pointed out that in defamation privilege depends not on what a defendant may have supposed to be his interest or duty, but upon what a judge decides his duty or interest, in fact, to have been (d). In the form of action now under consideration good faith is always a defence. In *Gerard v. Dickenson* (e), the defendant slandered the plaintiff's title to his manor by alleging that she had a lease of it for ninety years, and it was resolved that although she admitted by her plea that in fact she had no title to the said lease, but was altogether a stranger to it, yet the mere slander of itself, without knowledge of its falsity, gave no cause of action. It was further, however, resolved that the declaration was good in so much as it went on to allege that the defendant knew that "the lease was forged and counterfeited,

(a) *Burnett v. Tak*, (1882) 45 L. T. p. 127.
743.

(b) *Per Maule, J., Pater v. Baker*,
(1847) 3 C. B. p. 862, quoted with
approval by Montague Smith, J.,
Steward v. Young, (1870) L. R. 5 C. P.

(c) *Rowe v. Roach*, (1813) 1 M. & S.

304.

(d) See above, p. 586.

(e) (1590) 4 Rep. 18 a.

and yet (against her own knowledge) she has affirmed and published that it was a good and true lease" (a).

In another action for slander of title the jury were told that they were to give a verdict for the defendant, if they thought that in publishing the matter complained of he had acted on such grounds as would have persuaded a man of sound sense and knowledge of business. It was held, however, that this was a misdirection, and that the sole question was whether he had acted honestly and in good faith (b). So, in *Pater v. Baker* it is laid down that proof of actual malice is necessary. "The jury *may* infer malice from the absence of reasonable and probable cause but they are not *bound* to do so. The want of probable cause does not necessarily lead to an inference of malice, neither does the existence of probable cause afford any answer to the action" (c). Again, in *Wren v. Wield* (d), where the plaintiffs complained that the defendant had alleged certain machines of their manufacture to be infringements of his patent, the following passage occurs: "We think the action could not lie unless the plaintiffs affirmatively proved that the defendant's claim was not a *bonâ fide* claim in support of a right which, with or without cause, he fancied he had; but a *malâ fide* and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation" (e).

Absence of reasonable cause only evidence of malice.

There are indeed *dicta*, though no express decision, that malice is not necessary in this form of action, and that it is enough if the false statement was made without lawful cause. In *Western Counties Manure Co. v. Lawes' Chemical Manure Co.* (f), Bramwell, B., expressly so stated the law; and in the later case of *Dicks v. Brooks* (g), the same Judge in delivering the judgment of the Court of Appeal seems to have followed his former opinion. There the plaintiff had published a certain pattern which was considered by the defendant to be an infringement of his copyright. The latter thereupon put forth a circular saying, "We

Mere falsity not sufficient.

(a) (1590) 4 Rep. p. 18 b.

(b) *Pitt v. Donovan*, (1813) 1 M. & S. 639.

(c) *Per* Maule, J., (1847) 3 C. B. p. 868.

(d) (1869) L. R. 4 Q. B. 730.

(e) *Per Cur.*, *ibid.* p. 737; see too

Hargrave v. Le Breton, (1769) 4 Burr. 2423; *Smith v. Spooner*, (1810) 3 Taunt. 246; *Steward v. Young*, (1870) L. R. 5 C. P. 122; *Brook v. Rawl*, (1849) 4 Ex. 521.

(f) (1874) L. R. 9 Ex. p. 222.

(g) (1880) 15 Ch. D. 22.

give you notice that if you sell or offer for sale, exhibit or distribute any copy of the subject, 'The Huguenot,' without the stamp or imprint of our firm, in whom the sole subsisting copyright exists, that all such unstamped copies are imitations and unlawfully made." An injunction and also an inquiry as to damages were claimed. This circular, it was said (a), "may have been intended as a statement of the defendant's view of the law (b), but anybody might not unreasonably take it as a statement of the fact that somehow or other they had got such a right to the subject that, let it be reproduced in whatever form it might be, such reproduction was an infringement of their rights. I think, therefore, that if damages had been traced to the circular an action would have been maintainable." According to this decision the sole question is whether the defendant has made incorrect statements or not. No reference is made to malice throughout the case; no evidence of it appears on the face of the report. In the later case of *Halsey v. Brotherhood* (c) the authority of the earlier cases was expressly recognised, and the above quoted observations of Lord Bramwell were explained away. It seems, therefore, clear that a plaintiff can never recover damages unless the jury find malice in fact. Inquiries as to the defendant's interest or duty in the matter will be material, not as raising a distinct issue of privilege, but solely as throwing light on the motives of the publication.

Action only
for the actual
damage.

3. The action will not lie where actual damage does not result (d). "The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of this sort has been insisted upon for centuries" (e). In *Malachy v. Soper* (f) the declaration alleged that by reason of matter published by the defendant certain mining shares which the plaintiff

(a) *Per* Bramwell, L.J., 15 Ch. D. p. 40.

(b) As to a misstatement of law in this kind of action, see *Mildmay's case*, (1582-4) 1 Rep. 175 a.

(c) (1880-2) 19 Ch. D. 386. In *Mellin v. White*, (1894) 3 Ch. p. 280, Lindley, L.J., in stating what it is necessary to prove in this form of action omits to mention malice. But from the fact that he was a party to the decision in

Halsey v. Brotherhood, it is to be inferred that the omission was *per incuriam*. In the same case of *Mellin v. White*, Lopes, L.J., held malice to be essential. In the House of Lords, (1895) A. C. 154, the point was left open.

(d) *Evans v. Harlow*, (1844) 5 Q. B. 624; *White v. Mellin*, (1895) A. C. 154.

(e) *Per* Bowen, L.J., *Ratcliffe v. Evans*, (1892) 2 Q. B. p. 532.

(f) (1836) 3 Bing. N. C. 371.

possessed had become "much depreciated and lessened in value, to wit, in the value of £50 . . . and the plaintiff had been hindered and prevented from selling or disposing of his said shares, . . . and . . . from gaining, acquiring, or deriving divers profits, emoluments, benefits, and advantages which otherwise would have arisen and accrued to him." It was held that the averments were insufficient. "The doctrine of the older cases is, that the plaintiff ought to aver that, by the speaking, he could not sell or lease; and that it will not be sufficient to say only that he had an intent to sell without alleging a communication for sale. . . . There must be an express allegation of some particular damage resulting to the plaintiff" (a). By the expression particular damage is to be understood nothing more than an actual or temporal loss which has in fact occurred. Thus a general loss of custom as distinct from the loss of particular known customers is sufficient to support the action (b), provided the words complained of were published under such circumstances as to prevent the claim for such damage from being open to the objection, that the loss of the custom must have been due to unauthorised repetition of the slander, and consequently was too remote (c).

Actions of this kind have in modern times generally arisen as between rival traders, in cases in which a dealer in a particular commodity has published a statement disparaging the quality of his rival's goods. Even as between such parties an action will, in general, only lie in respect of such a statement, if it satisfies the above-mentioned requirement, of being false, malicious, and followed by damage (d). But it must be borne in mind that malice in this context, so far as it refers to the motive with which the defendant acted, means spite, a desire to injure the plaintiff as an end in itself, and does not include a desire to benefit the defendant at

Rival traders.

(a) *Per Cur.*, *Malachy v. Soper*, (1836) 3 Bing. N. C. p. 384.

(b) *Ratcliffe v. Evans*, (1892) 2 Q. B. 524.

(c) As to what those circumstances are, see above, pp. 620 *sqq.*, where the subject is fully discussed.

(d) *White v. Mellin*, (1895) A. C. 154. In this particular case none of the con-

ditions were satisfied. There was no evidence that the statement complained of was false, no evidence of malice, and no suggestion of damage; and see *supra*, *Linotype Co. v. British Empire Type Setting Co.*, (1898-9) 81 L. T. 331. See also *Alcott v. Millar's Karri & Jarrah Forests, Ltd.*, (1905) 91 L. T. 722.

the plaintiff's expense. A desire to draw away the plaintiff's customers is in itself perfectly legitimate. It is only when improper means are employed to gain that end that such a motive becomes malicious. And the only means which for this purpose the law will regard as improper is fraud, that is to say, the making of the false statement with a knowledge of its falsity (a). If one man publishes from a motive of pure spite a disparaging statement with regard to another's goods, presumably an action will lie if it turn out to be untrue, even though he did not know it to be untrue (b). On the other hand if the defendant did not act from spite, but from a desire to benefit himself, it will be essential to show that he knew his statement to be false (c). In *Young v. Macrae* (d), where a declaration was held bad which alleged that the defendant, in a published description of his own goods, untruly alleged them to be superior to those of the plaintiff, Cockburn, C. J., conceded that if a trader published matter which was false to his own knowledge of the goods of another, and damage followed, an action would lie. In point of fact, however, a trader, in disparaging his rival's goods, never acts from spite, but always with the object of benefiting himself. It seems, therefore, that in an action against a trader for a slander of that kind it is practically essential to prove his knowledge of the falsity, and that the necessity of proving that knowledge is not confined to cases in which the disparagement complained of consists in a comparison of the defendant's goods with the plaintiff's to the disadvantage of the latter, but applies also where the disparaging statement contains no specific reference to the defendant's goods. The case of *Western Counties Manure Company v. Lawes' Chemical Manure Co.* (e) no doubt seems to decide the contrary, but that case has been much commented upon (f), and is probably not law.

(a) See Lord Herschell's explanation of the term "maliciously" in *White v. Mellin*, *supra*, at p. 160. See too the judgments in *Mogul Steamship Co. v. McGregor, Gow & Co.*, (1892) A. C. 25, on the limits of fair competition, and the discussion on that subject, above, pp. 22-26; and see *Hubbuck v. Wilkin-Son*, (1899) 1 Q. B. 86, C. A.

(b) *Per Maule, J., Pater v. Baker*, (1847) 3 C. B. pp. 868-9.

(c) *Gerard v. Dickenson*, (1590) 4 Rep. 18 a.

(d) (1862) 3 B. & S. 264; 32 L. J. Q. B. 6.

(e) (1874) L. R. 9 Ex. 218.

(f) *White v. Mellin*, (1895) A. C. 154.

Where, indeed, the only disparagement of the plaintiff's goods consists in the defendant's vaunting the superiority of his own goods, it has on another ground been doubted whether the action will lie, namely, that of the undesirability of turning the courts of law "into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better" (a). And this reason for refusing to entertain the action would seem to apply even to a case in which the defendant knew his statement to be untrue.

(a) *Per* Lord Herschell, *White v. man in Ecans v. Harlow*, (1844) 5 Q. B. *Mellin*, (1895) A. C. 154 at p. 164, 624. See too *per* Lord Shand, *White v. Mellin*, p. 172.

Canadian Notes to Chapter XVIII.

SLANDER OF TITLE :

ALLEGATION OF INFRINGEMENT OF TITLE (a).

In *Cousins v. Merrill* (b) the defendant combined a caution Ontario. against having anything to do with the plaintiff or his pumps with a threat of prosecution for infringement of patent, using the expression "beware of the fraud." It was held that the declaration disclosed a libel on the plaintiff personally in the caution against having anything to do with the plaintiff or his pump as well as a cause of action for slander of title, and that in such an action the attention of the jury should be directed to the separate character of the publication in view of their finding one part to be true and the other untrue, and the damages should be specially awarded for the part which is untrue.

DEFENDANT SLANDERING PLAINTIFF'S TITLE IN DEFENCE OF HIS OWN (c).

The presumption of malice which is necessary to maintain the Ontario. action for slander of title fails when the evidence shows that the claim of the defendant to the property in dispute was put forth in good faith (d).

(a) P. 629, *supra*.

(b) 16 U. C. C. P. 114.

(c) P. 630, *supra*.

(d) *Boulton v. Shields*, 3 U. C. R. 21.

ACTION ONLY FOR ACTUAL DAMAGE (a).

Ontario.

To entitle the plaintiff to succeed there must be not only an allegation that the words complained of as conveying the slander of title are false and maliciously uttered, but also an express allegation of some special damage resulting from the slander actually sustained by the plaintiff, and such special damage must appear upon the face of the declaration to be the mere natural and direct consequence of the words complained of (b).

The degree of particularity with which the plaintiff must state his damages where he has been injured by the damping of an auction sale is discussed in *Catton v. Gleason* (c). It was held that the plaintiff should not be required to give particulars of the names of the persons who would have given for each article in respect of which damage was claimed a larger price than was realised at the sale; all he could reasonably be required to particularise was the amount by which his sale had been damped.

A counter-claim for damages arising from slander of title cannot be filed in an ordinary mortgage action (d).

New

Brunswick.

To maintain an action for slander of title the words must be followed as a natural and legal consequence by a pecuniary damage to the plaintiff, which must be specially alleged and proved (e).

(a) P. 633, *supra*.

(b) *Ashford v. Choate*, 20 U. C. C. P. 471, following *Malachy v. Soper*, 3 Bing. N. C. 385, allegation of loss of a sale,

&c., held to be sufficient.

(c) 14 P. R. 222.

(d) *Odell v. Bennett*, 13 P. R. 10.

(e) *Gordon v. McGibbon*, 3 Pug. 49.

CHAPTER XIX.

MALICIOUS PROSECUTION.

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It is obviously a grievance that an individual should be harassed by legal proceedings improperly instituted against him. If there is no foundation for them no doubt they will not ultimately succeed, but during their progress they may cause great injury. It is the right of every one to put the law in motion if he does so with the honest intention of protecting his own or the public interest, or if the circumstances are such, be his motives what they may, as to render it probable *prima facie* that law is on his side. But it is an abuse of that right to proceed maliciously, and without reasonable and probable cause for anticipating success.

Wrongfully
setting the
law in
motion.

Such an abuse may of necessity be injurious, as involving damage to character, or it may in any particular case bring about damage to person or property. There are, says Lord Holt (a), three sorts of damage to a plaintiff, any one of which is sufficient to support an action of malicious prosecution. "First, damage to his fame if the matter whereof he be accused be scandalous. Secondly, to his person, whereby he is imprisoned. Thirdly, to his property, whereby he is put to charges and expenses." To which may be added the damage which a man suffers when his house is entered and his property seized. Whenever a plaintiff can show that he has suffered under any of these heads of damage by reason of the defendant having wrongfully put the law in motion against him, whether civilly or

Nature of
damage
thereby
caused.

(a) *Sarill v. Roberts*, (1698) 12 Mod. p. 208.

Legal damage
seldom results
from abuse
of civil
proceedings.

criminally, he has a remedy (a). It is true that it is only under exceptional circumstances that a man against whom an unreasonable and malicious action has been brought can obtain reparation for the wrong by means of a separate action; this, however, is not because of any difference in principle between the abuse of civil or criminal process, but because generally in such a case no damage can be proved. There is no damage to reputation because "in no action, at all events in none of the ordinary kind, not even in those based upon fraud, where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury, but the bringing of the action is of itself no injury to him. When the action is tried his fair fame will be cleared if it deserves to be cleared; if the action is not tried, his fair fame cannot be assailed in any way by the bringing of the action" (b). Neither can a man suffer in his person from the mere fact of being sued. A party may indeed by a special step of procedure cause the arrest of his debtor, though only, as the law now stands, in very exceptional circumstances, and if such arrest is malicious an action lies. Finally, for the expense to which a defendant is put he finds as a general rule a sufficient remedy in the law of costs. "The law has provided that no man should prosecute without finding pledges (c), and that was a security against troublesome actions; then if the plaintiff's suit be vexatious and groundless he shall be amerced *pro falso clamore*; and though these amerciements be now matter of form, and therefore several Acts of Parliament have given costs to the defendants, yet we must judge by the reason of the law as it stood antiently, but in case of an indictment there is no provision or remedy but by bringing an action" (d).

Costs.

Malicious
prosecution.

It is, therefore, the malicious preferring of an unreasonable

(a) For statutory restrictions, see the Vexatious Indictments Act, 22 & 23 Vict. c. 17, and the Vexatious Actions Act, 59 & 60 Vict. c. 51.

(b) *Per* Bowen, L.J., *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11

Q. B. D. pp. 689-90.

(c) See for example, 11 Hen. VII. c. 15. This practice is of course now entirely obsolete.

(d) *Per* Holt, C.J., *Saill v. Roberts*, (1698) 12 Mod. p. 210.

criminal charge that is the usual foundation for the form of action now under consideration; and this is what is ordinarily understood by the familiar title of an action of malicious prosecution. It will be seen that it bears some analogy to an action of defamation (*a*); insomuch as it is in the first place an action for the vindication of character, which is necessarily involved in a criminal charge, and only in the second place for the damage shown to have arisen under the special circumstances of the case.

And as an action lies for malicious words, though not defamatory, if they cause special damage, so there are certain cases, now of infrequent occurrence, in which an action lies for the special damage caused by abuse of legal process where no criminal charge is made, and consequently no question of character is involved.

Abuse of process.

In an action of malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious.

1. The term *criminal charge* includes "all indictments involving either scandal to reputation or the possible loss of liberty to the person" (*b*). There are, however, many cases in which, though the proceedings follow the forms of the criminal law, they are substantially civil in their nature. No one regards a man convicted on an indictment for the non-repair of a highway as a criminal (*c*). A moral stigma will inevitably attach where the law visits an offence with imprisonment, but it may attach also where a fine only can be inflicted, as where proceedings are taken

Prosecution on a criminal charge.

(*a*) See *per Bowen, L.J., Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. p. 692.

(*b*) *Ibid.*, p. 691.

(*c*) Similarly an attachment is sometimes punitive in its nature, sometimes simply a means of enforcing obedience. In the one case it is criminal, in the other civil in its nature (*In re Freston*, (1883) 11 Q. B. D. 545; *In re Gent, Gent-Davis v. Harris*, (1888) 40 Ch. D.

190; *In re Armstrong, Ex parte Lindsay*, (1892) 1 Q. B. 327; *Reg. v. Barnardo*, (1889) 23 Q. B. D. 305, 308). In the one case, therefore, it is apprehended an action might lie in respect of proceedings for an order of attachment, since they would be necessarily injurious to reputation; while in the other there would be no injury unless there were actual damage.

against a traveller for attempting to avoid payment of a tramway fare (a). At the same time there are many regulations which the State has laid down for the public convenience, and of which the infraction is punished by a fine, but which it is apprehended could not give rise to an action for malicious prosecution on the ground of scandal to reputation ; for instance, a man's reputation could hardly suffer because he was proceeded against for laying a drain pipe in an improper manner, or keeping a pig in an improper place. It has been pointed out already that it is defamatory to say of any one that he has committed an offence for which he can be made to suffer corporally (b). *A fortiori*, therefore, is it injurious to his character to formally accuse him of such an offence. It is to be noticed, however, that the distinction taken in the old cases is that no action lies for damage to character where the charge is not in its nature "scandalous." Therefore, it was held in *Savill v. Roberts* (c) that a defendant who had preferred against the plaintiff an indictment for riot, on which he was acquitted, could not be liable except for the expense of preparing the defence. So, in another case (d) it was said that the mere preferring of an indictment for assault involved no injury to the good fame of the plaintiff. It is difficult to see on what grounds it can be maintained that a charge of breaking the peace conveys no imputation on the character of the person charged, and it may be doubted whether the authority of the cases above mentioned would now be recognised on this point. It is to be observed that formerly, in cases of slander by imputation of a criminal offence, a similar distinction was held to prevail between accusations which were simply defamatory and accusations which were "scandalous," and it was said that the latter only were actionable (e) ; but this distinction would appear to be now obsolete. Presumably an application to the Court to strike a solicitor off the rolls for misconduct would be a proceeding upon

(a) *Rayson v. South London Tramways Co.*, (1893) 2 Q. B. 304. As to when a principal is, and is not, responsible for the malicious act of his agent towards a third party, see *Farry v. Great Northern Ry.*, (1898) 2 Ir. R. 352 ; *Knight v. North Metropolitan Tramways Co.*, (1898) 78 L. T. 227.

(b) See above, pp. 555 *seq.* ; *Webb v. Bearan*, (1883) 11 Q. B. D. 609.

(c) (1698) 12 Mod. 208.

(d) *Byne v. Moore*, (1814) 5 Taunt. 187.

(e) See *Turner v. Ogden*, (1703) 6 Mod. 104.

a criminal charge for which an action for malicious prosecution would lie.

If articles of the peace have been exhibited, or sureties of the peace have been demanded, maliciously and without cause against the plaintiff, and he has been imprisoned in consequence of failing to find sureties, he may recover damages in respect of such imprisonment (a), but it does not seem clear whether he has any right of action in respect of the injury to his character as well as the injury to his person. An action will lie for false imprisonment (without presumption of malice) against the governor of a gaol, either for the reception of a prisoner without a proper warrant of commitment (b), or for the action of his agents in detaining a prisoner after his acquittal (c).

Maliciously exhibiting articles of the peace.

Illegal imprisonment.

To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question. If a charge is made to a police constable, and he thereupon makes an arrest, the party making the charge, if liable at all, will be liable in an action for false imprisonment, on the ground that he has directed the arrest, and therefore it is his own act and not the act of the law. But if he goes before a magistrate who thereupon issues his warrant, then his liability, if any, is for malicious prosecution. "The party making the charge is not liable to an action for false imprisonment because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment" (d). A justice of the peace can only take action on an information laid before him. If he thinks that it discloses ground for believing that an offence has been committed, he either issues a warrant for the arrest of the incriminated party or a summons commanding his attendance. But until he issues such summons or warrant the prosecution cannot be said to begin. The gist of the action for malicious prosecution is that the defendant set the magistrate in motion. "Laying the

What is a prosecution.

(a) *Steward v. Gromett*, (1859) 7 C. B. N. S. 191; but see *Cutler v. Dixon*, (1885) 4 Rep. 14 a.

(b) *Dormer v. Cook*, (1903) 88 L. T. 629.

(c) *Mee v. Cruickshank*, (1902) 86 L. T. 708.

(d) *Per Willes, J., Austin v. Dowling*, (1870) L. R. 5 C. P. p. 540; cp. *Lock v. Ashton*, (1848) 12 Q. B. 871.

information before the magistrate would not be the commencement of the prosecution, because the magistrate might refuse to grant a summons, and if no summons, how could it be said that a prosecution against any one ever commenced?" (a). Although when once a summons is issued, the commencement of the prosecution relates back to the laying of the information (b). By parity of reasoning the preferring of a bill of indictment directly before a grand jury (in cases in which there have been no previous proceedings before a magistrate) would not be the commencement of a prosecution, so as to justify an action if the bill is ignored. The same observation would apply to proceedings before the Committee of the Incorporated Law Society, on an application to strike a solicitor off the rolls, where they find that there is no *prima facie* case of misconduct.

Search
warrant.

There is one form of magisterial procedure in criminal cases which stands on a special footing. If information is given that stolen goods are in the possession of any one, a warrant may issue to search his premises, where they are supposed to be concealed, and, if they are found, to arrest him (c). There is no doubt that an action lies in respect of the entry and arrest under such a warrant if it is improperly procured (d); but it is not clear whether the issue of the warrant can of itself be regarded as a prosecution, and actionable as involving an injury to character. In *Wyatt v. White* (e), which was an action for maliciously procuring the issue of a search warrant, Willes, J., at *nisi prius* allowed no damages except for the invasion of the plaintiff's premises and the seizure of his person, but it does not appear whether the question as to character was raised before him.

Where
magistrate
acts of his
own motion.

A person who simply makes a candid statement of facts to a magistrate without formulating any charge, is not responsible for the consequences of any step which the magistrate may thereupon, in the exercise of his discretion, think fit to take. The

(a) *Per* Brett, M.R., *Yates v. The Queen*, (1885) 14 Q. B. D. p. 657; see too *per* Cotton, L.J., *ibid.* p. 661; *per* Patteson, J., *Gregory v. Derby*, (1839) 8 C. & P. p. 750, where it was said that even the issue of a warrant not followed by an arrest would not give a cause of action. See *King v. Cole*, (1796) 6 T. R.

640.

(b) *Thorpe v. Priestnall*, (1897) 1 Q. B. 159, at p. 162.

(c) 24 & 25 Vict. c. 96, s. 103.

(d) *Elere v. Smith*, (1822) 1 D. & R. 97.

(e) (1860) 29 L. J. Ex. 193.

magistrate acts of his own motion and not at the instigation of the person giving the information, who, therefore, is not to be considered as a prosecutor (a). But if an actual charge is made, though in an indefinite form and as a mere matter of suspicion and hearsay, a prosecution is thereby instituted (b). The prosecutor is answerable for the ulterior consequences, and it is not open to him to say that they were due to the mistake or indiscretion of the tribunal which he has put in motion (c). The distinction between cases where mere information is given and cases where a charge is made is necessarily somewhat fine. In one case (d) it was held that, where a defendant had laid an information before a magistrate under 48 & 49 Vict. c. 69, s. 10, that there was reasonable cause to suspect that the plaintiff was detaining a girl for immoral purposes, and the magistrate thereupon issued a search warrant, the defendant, not having in any way deceived the magistrate, could not be liable for the manner in which the latter had thought fit to exercise his discretion. This decision turned to a great extent on the language of the statute in question, but it has since been followed as an authority in an action which was brought for maliciously procuring a search warrant to issue for goods alleged to be stolen (e). These two cases appear to establish the proposition that under ordinary circumstances a person applying for a search warrant is not to be considered a "prosecutor," but merely a person giving information for the consideration of a magistrate; the latter acting on his own motion and not at the instigation of the informant (f).

Where a charge made.

(a) *Cohen v. Morgan*, (1825) 6 D. & R. 8; *per Erle, C.J.*, *Steward v. Gromett*, (1859) 7 C. B. N. S. p. 204; *per Lord Campbell, C.J.*, *Farley v. Danks*, (1855) 4 E. & B. p. 499.

(b) *Elsee v. Smith*, (1822) 1 D. & R. 97; *Davis v. Noake*, (1816-7) 6 M. & S. 29; *Wyatt v. White*, (1860) 29 L. J. Ex. 193.

(c) See *per Brett, M.R.*, *Quartz Hill Consolidated Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. p. 684, dissenting from a contrary expression of opinion by Martin, B., in *Johnson v. Emerson*, (1871) L. R. 6 Ex. pp. 379-80.

(d) *Hope v. Evered*, (1886) 17 Q. B. D. 338; see also *Lea v. Charrington*, (1889)

23 Q. B. D. 45; W. N. 1889, p. 150.

(e) *Utting v. Berney*, (1888) 5 Times L. R. 39.

(f) Some, however, of the language used in *Hope v. Evered*, (1886) (see *per Lord Coleridge, C.J.*, 17 Q. B. D. p. 340), seems hardly consistent with the law as laid down in *Quartz Hill Consolidated Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. 674, *supra*. Great stress is laid on the fact that the magistrate in issuing a search warrant acts judicially, but in all actions of malicious prosecution the essence of the plaintiff's case is that he has been wronged by means of a judicial act.

Apparently, however, a justice, who, after applying his mind in a judicial manner to an information laid before him, showing reasonable cause, issues his warrant, is not liable in an action for malicious procedure merely because the judicial act results in a tort, it having been held by Russell, C.J., in the case of *Jones v. German* (a) (in which judgment was given for the defendant) that "an allegation of the actual commission of a felony is not necessary to justify a magistrate in granting his warrant."

Deceiving
tribunal.

It is quite clear, however, that a defendant who has misled a tribunal by dishonest evidence and thereby caused it to act to the prejudice of the plaintiff is liable, even though he may not have purported to be the prosecutor (b).

Effect of
binding over
to prosecute.

If a magistrate decides to commit a case for trial, he is empowered to bind over the prosecutor to attend and prosecute at the Court by which the accused is to be tried (c). The mere fact, however, that a man has been bound over does not necessarily prove that he is the person responsible (d), neither on the other hand, if he is the person who in truth has started the prosecution, can he shelter himself from liability in respect of the subsequent proceedings by the plea that he was acting under legal compulsion and in obedience to the magistrate's order (e). In *Fitzjohn v. Mackinder* (f), the plaintiff and defendant had been parties to a suit in the County Court and had given evidence in direct contradiction to one another. In reality the perjury was on the side of the defendant, but the judge took a view adverse to the plaintiff, committed him for trial on a charge of perjury, and bound over the defendant to prosecute (g). The defendant duly presented an indictment before the grand jury. went before them, and repeated his perjured evidence. A true bill was found, the plaintiff was put on his trial and ultimately

(a) (1896) 2 Q. B. 418.

(b) *Per* Lord Campbell, *Farley v. Danks*, (1855) 4 E. & B. p. 499; *per* Lord Coleridge, *Hope v. Erered*, (1886) 17 Q. B. D. p. 340.

(c) 11 & 12 Vict. c. 42, s. 20.

(d) *Eager v. Dyott*, (1831) 5 C. & P. 4.

(e) *Dubois v. Keats*, (1840) 11 A. & E. 329. See also *Mittens v. Foreman*, (1889) 58 L. J. Q. B. 40, where the

Court refused to stay an action for malicious prosecution as frivolous and vexatious on the ground that the defendant was the trustee under the plaintiff's bankruptcy and had prosecuted him by order of the Court under s. 16 of the Debtors Act, 1869.

(f) (1860-1) 8 C. B. N. S. 78; 9 C. B. N. S. 505.

(g) Under 14 & 15 Vict. c. 100, s. 19.

acquitted. He then brought an action for malicious prosecution, and it was decided in the Exchequer Chamber, reversing the judgment of the Common Pleas, that the action was maintainable. Two of the judges in the Court below decided for the defendant on the ground that he had only remotely caused the County Court judge's order for prosecution, and that his subsequent conduct was protected by that order. Willes, J., dissenting, held that he could not plead an order obtained by his own fraud and perjury. In the Court above Cockburn, C.J., and Channell, B., held that the defendant was liable as having procured the order, liable as having preferred the bill, and liable as having given false evidence before the grand jury. Bramwell, B., however, was of opinion that he was only liable on the last ground; that he was bound to prosecute, but not bound to prosecute by means of false evidence. On the other hand Blackburn and Wightman, JJ., were prepared to affirm the judgment of the Court below. It will thus be seen that there was an exactly equal division of judicial opinion in this case, and that the judges whose view ultimately prevailed were not altogether agreed as to the grounds of their judgment. In *Barber v. Lesiter* (a) it was held that an allegation that the defendant caused it to appear that the plaintiff was the proprietor of an illicit still, in consequence of which he was prosecuted by the Excise authorities, could not amount to an allegation of a prosecution by the defendant.

Indirectly
causing
prosecution.

A defendant may become liable by holding himself out as prosecutor, or allowing himself to be considered as such, though in reality he is only acting as agent for others (b).

Holding
self out as
prosecutor.

A defendant (which term includes a corporation (c)) may be liable in this as on other torts for acts done with his authority or subsequently ratified (d). If an agent institutes a prosecution within the scope of his employment and in pursuance of a general authority, any malice or unreasonableness which may actuate him in so doing are imputed to his principal. In this way an action of malicious prosecution may be maintained against a

Principal
and agent.

(a) (1859) 7 C. B. N. S. 175.

Brown, (1904) A. C. 423.

(b) *Clements v. Ohrlly*, (1847) 2 C. & K. 686.

(d) For criminal liability of master for act of servant, see *Coppen v. Moore*,

(c) *Citizens Life Assurance Co. v.*

(1898) 2 Q. B. 306.

corporation, which is itself, of course, incapable of malice (a). If, however, a principal himself controls a prosecution and simply employs a ministerial agent to carry out the proceedings, the fact that the agent was malicious or had reason to know the prosecution ill-founded, will not it seems affect his innocent principal (b). In either case, if the state of mind of the agent is such as to make his participation in the unfounded proceedings wrongful, he is liable.

Maliciously
continuing
proceedings.

A malicious prosecution may consist in the wrongful continuance of proceedings already set on foot by other persons. Such continuance, however, will not in itself amount to a ratification of the antecedent steps; and it may well be that under such circumstances there may be good cause for the continuance of a prosecution, the initiation of which was wrongful (c).

Determina-
tion of
prosecution.

2. The reason why a plaintiff cannot as a rule succeed if a prosecution, of which he complains, terminates adversely is that otherwise there might be a conflict between civil and criminal justice, and all the issues, the conclusive determination of which properly belongs to the criminal court, might be tried over again by a sort of informal appeal (d). It makes no difference that the conviction took place before some court of inferior jurisdiction against which no appeal lay to a higher court. The convicted person will not be allowed to do indirectly that which he cannot do directly (e). In view of the recent decision in the Scotch case of *Wilson v. Bennett* (f) this proposition must, however, be taken with some reservation. Sometimes, however, from the circumstances of the case, it is impossible that the proceeding in question should have been determined in the plaintiff's favour. Thus, if his house is ransacked under a search warrant and nothing is found there to incriminate him, the matter goes no farther, but it cannot be said to be decided in his favour. Yet in such a case he would have a right of action if malice and

Ex parte
proceedings.

(a) On this subject, see above, pp. 60 *sqq.*, where the matter is fully discussed; and see *Edwards v. Midland R. Co.*, (1880) 6 Q. B. D. 287.

(b) *Johnson v. Emerson*, (1871) L. R. 6 Ex. 329.

(c) *Weston v. Beeman*, (1858) 27 L.J.

Ex. 57; see too *Moon v. Towers*, (1860) 8 C. B. N. S. 611.

(d) *Per Cur.*, *Castrique v. Behrens*, (1860-1) 3 E. & E. p. 721.

(e) *Baseb v. Matthews*, (1867) L. R. 2 C. P. 684.

(f) (1904) 6 F. 269, Ct. of Sess.

absence of reasonable cause were shown (a). So, if articles of the peace are exhibited in the King's Bench against a man and he is called on to find sureties of the peace, he is not allowed to controvert the matters stated on affidavit against him, and consequently he is not precluded in any future proceeding from questioning the order which was made *ex parte* against him. The same rule formerly applied when sureties of the peace were demanded before a magistrate (b). But now in such a case the procedure is regulated by 42 & 43 Vict. c. 49, s. 25, and both parties and their witnesses are heard and examined.

The right of action against persons who put in force the Lunacy Act, 1890, by presenting to the judicial authority created by that Act a petition for a reception order, has already been dealt with (c).

So long as proceedings are pending no action lies on the ground that they have been wrongfully instituted (d). It must appear that they were brought to a "legal end." Where the plaintiff alleged that he had been arrested on a false charge and subsequently discharged from imprisonment, it was held that he did not sufficiently show on the face of his declaration the termination of the proceedings (e). The end, however, need not be a final and conclusive one. If a magistrate refuses to commit for trial a person charged before him (f), the particular prosecution is concluded, although it may be lawful to institute a fresh prosecution for the same offence. It is in fact not necessary for the plaintiff to prove that he was absolutely in the right, but rather that the matter of which he complains so terminated as not to be inconsistent with his right to maintain his action. In *Craig v. Hasell* (g) the plaintiff sought to recover against the defendant for maliciously procuring an extent for a Crown debt to issue against him, and he alleged that the writ had been superseded and came to an end. To this it was pleaded that the

Prosecution
must come
to legal end.

Determina-
tion need not
be conclusive

(a) *Wyatt v. White*, (1860) 29 L. J. Ex. 193. See above, p. 642.

(b) *Steward v. Gromett*, (1859) 7 C. B. N. S. 191.

(c) See above, pp. 211 *sqq.*

(d) "It is a rule of law that no one shall be allowed to allege of a still depending suit that it is unjust." *Per*

Cur., *Gilding v. Eyre*, (1861) 10 C. B. N. S. p. 604.

(e) *Morgan v. Hughes*, (1788) 2 T. R. 225.

(f) *Delegal v. Highley*, (1837) 3 Bing. N. C. 950.

(g) (1843) 4 Q. B. 481.

supersedeas had been granted to the plaintiff at his request and upon terms, as an act of grace on the part of the Crown. It was held, however, that the plea was bad. "All that the rule of law in cases of malicious prosecution requires is that the writ of extent should be traced to its close; and that is done by showing it discharged by the Court though upon arrangement and by consent. . . . Such a termination of the case negatives no fact essential to maintaining the action. . . . The plea is clearly bad. Consistently with all the facts stated in it the writ of extent may have been sued out by the defendant without any reasonable and probable cause" (a). So, it is enough if the proceeding has been abandoned without being brought to a formal end, though this cannot well happen in a criminal prosecution (b).

Reasonable and probable cause—a question for the judge.

3. The question of reasonable and probable cause frequently occasions no little embarrassment in the conduct of a trial, not so much from its own inherent difficulty as from the manner in which it presents itself: since, first of all, it involves the proof of a negative, and, secondly, in dealing with it the judge has to take on himself a duty of an exceptional nature. The plaintiff has, in the first place, to give some evidence tending to establish an absence of reasonable and probable cause operating on the mind of the defendant (c). To do this he must show the circumstances under which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him, unless it also appear that those facts were within the personal knowledge of the defendant. If they were not, it must be shown what was the information on which the defendant acted, which is sometimes done by putting in the depositions taken before the magistrate (d). Sometimes a case may be made out, whatever the state of facts may be, by means of evidence that the defendant did not believe in the justice of

(a) *Per Cur.*, *Craig v. Hasell*, (1843) 4 Q. B. p. 492.

(b) *Pierce v. Street*, (1832) 3 B. & Ad. 397.

(c) *Abrath v. North Eastern Ry.*, (1886) 11 App. Cas. 247; *Willans v. Taylor*, (1829-31) 6 Bing. 183. As

to what constitutes reasonable and probable cause for the institution of bankruptcy proceedings, see *Cor v. English, Scottish & Australian Bank, Ltd.*, (1905) A. C. 168, P. C.

(d) *Walker v. South Eastern R. Co.*, (1870) L. R. 5 C. P. 640.

his own prosecution, for if that is so, there is no reasonable and probable cause for *him* (a).

It is, of course, for the judge to say whether there is evidence to go to the jury, and if there is, it is for the defendant then to elect whether he will attempt to impeach, contradict, or supplement it. When all the evidence is before the Court every disputed fact and every disputed inference of fact is for the jury to decide upon, with this exception, that the final inference as to the presence or absence of reasonable and probable cause is to be drawn by the judge alone. He must accordingly make the jury find the facts and draw the subordinate inferences specially, or he must leave the whole case to them with a hypothetical direction that if they take such and such a view of the case there is reasonable and probable cause, and otherwise not. However numerous and complicated the facts may be, one or other of these courses has to be adopted (b).

Province of jury.

The inference of reasonable and probable cause has been sometimes called an inference of law, sometimes an inference of fact, sometimes a mixed inference. In truth, however, the distinction between the two classes of inferences is practical rather than theoretical. An inference which a jury say may be drawn from the premises is an inference of fact; an inference which the judge says must be drawn from the premises according to legal rules is an inference of law (c). The trial of an action is a long inductive process. The ultimate premises are the various statements made by the witnesses. From these statements it is inferred that a certain condition of things existed, and that certain things were said and done on the one side and the other, and so the case advances through a series of converging inferences until the final inference is reached that there should be a verdict for the defendant or the plaintiff, as the case may be. If at any stage of a trial certain matters are established, the proper effect of which

Inferences of law and fact.

(a) *Willans v. Taylor*, (1829-31) 6 Bing. 183; *Broad v. Ham*, (1839) 5 Bing. N. C. 722; *Turner v. Ambler*, (1847) 10 Q. B. 252.

(b) *Panton v. Williams*, (1841) 2 Q. B. 169; *Lister v. Perryman*, (1870) L. R. 4 H. L. 521. An able summary of the factors necessary to constitute a *prima*

facie presumption of reasonable and probable cause is furnished by the judgment of the Court of Appeal in *Hicks v. Faulkner*, (1882) 46 L. T. 127, C. A.

(c) The respective provinces of judge and jury are well defined by the House of Lords in the *Metropolitan R. Co. v. Wright*, (1886) 11 App. Cas. 152.

Evidence
not legally
admissible.

Mere
suspicion.

Knowledge
of evidence
furnishing an
answer to
the charge.

he has such evidence as will be legally sufficient to secure a conviction. In *Dawson v. Vansandau* (a) the defendant had preferred a charge of conspiracy against the plaintiff on the evidence of an alleged accomplice, and it was held that he might well have reasonable and probable cause. "An accomplice or tainted witness may give evidence sufficient to make out a *prima facie* case and warrant the preferring of a criminal charge, though it might not be sufficient evidence upon which to convict" (b). Neither is it necessary that the defendant should act only on legal evidence and inquire into everything at first hand. It is sufficient if he proceeds on such information as a prudent and cautious man may reasonably accept in the ordinary affairs of life (c); and it is for the plaintiff to satisfy the jury that there was a want of proper care in testing that information (d).

It is not, however, justifiable to commence a prosecution on mere suspicion. It is not a reasonable ground for a charge of forgery that the forged document resembles the handwriting of the party accused (e), nor is possession of stolen goods a long time after their abstraction a reasonable ground for a charge of larceny (f). It has been held that evidence of the plaintiff's bad character has no bearing on the issue of reasonable and probable cause (g).

It may sometimes be contended that a prosecution is unreasonable, not on the ground that the prosecutor had no substantial information before him pointing to the guilt of the plaintiff, but because he was also aware of countervailing evidence which afforded a good answer to the charge. A prosecutor has no right to pick and choose among the evidence before him, and act only upon such portions of it as show that he has good cause for

(a) (1863) 11 W. R. 516.

(b) *Per Cur.*, *Dawson v. Vansandau*, (1863) 11 W. R. at p. 518.

(c) *Lister v. Perryman*, (1870) L. R. 4 H. L. 521; see *Chatfield v. Comerford*, (1866) 4 F. & F. 1008; *Gibson v. Teasey*, (1867) 15 L. T. N. S. 586.

(d) *Abrath v. North Eastern R. Co.*, (1883-6) 11 Q. B. D. 440; 11 App. Cas. 247. See also *Brown v. Hawkes*, (1891) 2 Q. B. 718.

(e) *Clements v. Ohrlly*, (1847) 2 C. &

K. 686.

(f) *Hogg v. Ward*, (1858) 3 H. & N. 417. This was a case of wrongful arrest by a policeman. But the question of reasonableness would appear to be the same as in a case of malicious prosecution, although the burden of proof is altered. See, too, *Bussat v. Gibbons*, (1861) 30 L. J. Ex. 75.

(g) *Newsam v. Carr*, (1817) 2 Stark. 69.

proceeding; nor on the other hand proof that he is bound to assume that the theory put forward for the defence is sound. "If a man makes a charge before a magistrate, and the accused brings a number of respectable witnesses to prove an *alibi*, is the prosecutor liable to an action if he goes before the grand jury?" (a). "Suppose the party has clearly, at the moment, probable cause to believe that a man who robbed him was his servant, but on going home he found him with a broken leg, which had been bandaged for a week, could you say it be said that case there was probable cause?" (b). In *James v. Phelps* (c) the defendant had indicted the plaintiff for maliciously obstructing an airway in a mine. It appeared that the airway had been obstructed by the plaintiff, but under a claim of right, as the defendant knew, and it was held that there was an absence of reasonable and probable cause.

A defendant is not necessarily to be considered as unreasonable because he might not have known, had his memory and judgment of the particular facts been perfectly accurate and sound, that he had no good ground for proceeding. Memory and judgment may play a man false in a particular instance, though in general they may have good reason for trusting them. If, for instance, of himself has made a mistake in the identification of stolen property, and in consequence has prosecuted, it will be for the jury to say whether his mistake was an unreasonable one (d). In *Hicks v. Faulkner* (e) the plaintiff had sworn in a County Court action that he had given a certain key to the defendant; the defendant denied this and prosecuted the plaintiff for perjury. It was held that there might be good cause for the prosecution, even assuming the plaintiff to have spoken the truth, provided the defendant had an honest though mistaken trust in his own memory. "If a man has never seen reason to doubt, but on the contrary has ever had reason to trust, the general accuracy of his memory, and that memory presents to him a vivid apparent recollection that a particular occurrence took place in his

Lapses of memory and judgment.

(a) *Per Alderson, B., Musgrove v. Newell*, (1836) 1 M. & W. p. 584; see too *per Alderson, B., Heslop v. Chapman*, (1853) 23 L. J. Q. B. p. 51.

(b) *Per Lord Abinger, C.B., Musgrove v. Newell*, (1836) 1 M. & W.

p. 586; see, too, *Hogg v. Ward*, (1858) 3 H. & N. 417.

(c) (1840) 11 A. & E. 483.

(d) *Douglas v. Corbett*, (1856) 6 E. & B. 511.

(e) (1878) 8 Q. B. D. 167.

will prejudice the plaintiff's remedy (a). After judgment he may be imprisoned for disobedience to an order for payment, made on satisfactory evidence of his having 'adequate means' (b). Arrest on civil process must therefore always be a purely judicial act, and it is but seldom that any cause of action can arise in respect of it. In *Daniels v. Fielding* (c), it was held that a plaintiff who sued in respect of an arrest under a judge's order, could not recover merely on evidence that the defendant had acted maliciously and without reasonable cause, but he must show that the order had been obtained by some fraud on the Court. It may, however, be doubted whether this view of the law would now be accepted. The case of *The Quartz Hill Consolidated Gold Mining Co. v. Eyre* (d) seems to show that in no case can a person who has maliciously and unreasonably set the law in motion absolve himself from the consequences which he invited and brought to pass, by the suggestion that their immediate cause was a mistake on the part of the judge (e). If there is good cause for an arrest in other respects, but the amount for which security was required was excessive, the plaintiff must prove that by reason of the undue demand his imprisonment was prolonged or the expense of procuring his discharge was increased (f). An action will lie as well for a malicious detention as for a malicious arrest. In *Moore v. Gardner* (g), the plaintiff had been in custody under an attachment for non-payment of costs. He subsequently paid them to the solicitor on the other side, who, however, refused to give an order to the sheriff for his discharge and compelled him to go to the Court. It was held that the plaintiff could not recover, because the refusal was not alleged to be malicious, but it was not doubted that with such an allegation the defendant might have been liable.

Malicious
detention.

Malicious
execution.

If a man's goods are seized under a judgment irregularly or fraudulently signed, the proper remedy is to have the judgment

(a) 32 & 33 Vict. c. 62, s. 6.

(b) 32 & 33 Vict. c. 62, s. 5. As for the power of arrest of the bankruptcy court, see 46 & 47 Vict. c. 52, s. 25.

(c) (1846) 16 M. & W. 200.

(d) (1883) 11 Q. B. D. 674; see above,

p. 659.

(e) *Per Brett, M.R., ibid.* p. 684.

(f) *Jenings v. Florence*, (1837) 2 C. B. N. S. 467.

(g) (1847) 16 M. & W. 595; see, too,

Crozer v. Pilling, (1825) 4 B. & C. 26.

set aside, and then the seizure can be treated as not made under any legal process whatever, and therefore as a mere trespass (*a*). As already pointed out (*b*), an action does not lie simply because an execution creditor acts out of malicious motives. If, however, part of a judgment debt be paid and the creditor nevertheless maliciously takes out execution for the full amount, in such a case, the judgment being in itself unimpeachable, the remedy is for the unfair use of the power which it confers. "It would not be creditable to our jurisprudence if the debtor had no remedy by action where his person or goods have been taken in execution for a larger sum than remained due upon the judgment, . . . the creditor well knowing that the sum for which execution is sued out is excessive, and his motive being to oppress or injure the debtor" (*c*). The same principle would apply if a judgment creditor were to refuse a due tender of the debt and then maliciously sue out an execution (*d*). From the nature of the case the plaintiff in an action of this kind cannot be put to prove the favourable determination of the proceeding of which he complains (*e*).

"Charges and expenses," which are mentioned in *Savill v. Roberts* (*f*), as the third head of damage, can only in rare cases afford a substantive ground of action, because in nearly all proceedings not of an exclusively criminal nature there is now power to award costs to a successful defendant, and it would be inconsistent after a court of competent jurisdiction had dealt with this matter to allow the same point to be raised in a separate action. If the proceedings in question have terminated adversely to the complaining party he has no cause of action; if in his favour, the cause of his damage is his failure to obtain

(*a*) *Brown v. Jones*, (1846) 15 M. & W. 191; *Bates v. Pilling*, (1826) 6 B. & C. 38; *Riddell v. Pakeman*, (1835) 2 C. M. & R. 30; see above, p. 196.

(*b*) See above, p. 19.

(*c*) *Per Cur.*, *Churchill v. Siggers*, (1854) 3 E. & B. pp. 937-8.

(*d*) See *Gilding v. Eyre*, (1861) 10 C. B. N. S. 592.

(*e*) *Gilding v. Eyre*, (1861) *supra*. For other cases of abuse of civil process, see *Redway v. McAndrew*, (1873) L. R.

9 Q. B. 74; *The Walter D. Waller*, (1893) P. 202 (malicious arrest of a ship); *Craig v. Hasell*, (1843) 4 Q. B. 481 (malicious issuing of an extent); *Gibbs v. Pike*, (1842) 9 M. & W. 351 (maliciously registering a judgment); *Horsley v. Style*, (1893) 69 L. T. 222 (registration of a document supposed to be a bill of sale). See, too, *Dimmock v. Bowley*, (1857) 26 L. J. C. P. 231; *Munce v. Black*, (1858) 7 Ir. C. L. R. 475. (*f*) (1698) 12 Mod. p. 208.

Maliciously inducing a pauper to sue.

costs from the Court and not the malicious conduct of his opponent. It is true that litigants are almost invariably put to greater expense than they can recover on taxation from the other side, but such costs not being strictly necessary are not considered as a legal damage (*a*). It may sometimes happen that litigation is pursued in the name of a person who is only nominally plaintiff, and against whom an order for costs is unavailing by reason of his insolvency. A successful defendant cannot under such circumstances bring his action for costs against the person really interested in the absence of malice; his proper course was to obtain security beforehand (*b*). If, however, anyone having no interest in the matter maliciously induces a pauper to bring an unfounded action, on the failure of which the defendant is unable to satisfy his costs owing to the plaintiff's insolvency—a legal damage flows directly from the wrongful conduct of the instigating party which affords a good ground of action (*c*).

Malicious prosecution before courts-martial.

No action lies for a malicious prosecution before a court-martial. The civil courts cannot undertake to adjudicate on questions of military discipline, and the aggrieved party must look for his remedy to his official superiors (*d*). It is of course different where a wrongful act is committed without jurisdiction under mere colour of military authority, but in such a case the injured party sues for the act itself and not for the malicious prosecution (*e*).

Malicious proceedings in foreign court.

It would seem that malicious proceedings taken in a foreign Court may be actionable. The plaintiff can only succeed under the same conditions as would apply to an action brought in respect of the misuse of a domestic tribunal (*f*).

Extortion under colour of process.

A legal process, not itself devoid of foundation, may be

(*a*) *Cotterell v. Jones*, (1851) 11 C. B. 713; see *Quartz Hill Consolidated Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. 674. See, however, *Bradlaugh v. Newdegate*, (1883) 11 Q. B. D. 1, *contra*, and note *Foxall v. Barnett*, (1853) 2 El. & Bl. 928, although in this case the damages recovered were subsidiary to the action.

(*b*) *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, (1876) 2 App. Cas. 186.

See *Purton v. Honnor*, (1798) 1 B. & P. 205; *Savill v. Roberts*, (1698) 12 Mod. 208.

(*c*) *Pechell v. Watson*, (1841) 8 M. & W. 691; see *Cotterell v. Jones*, *supra*.

(*d*) *Johnstone v. Sutton*, (1786) 1 T. R. 548-50.

(*e*) *Warden v. Bailey*, (1811) 4 Taunt. 67.

(*f*) *Castrique v. Behrens*, (1860-1) 3 E. & E. 709.

maliciously employed for some collateral object of extortion or oppression ; and in such case the injured party may have his right of action, although the proceedings of which he complains may not have been determined in his favour. Thus, in *Grainger v. Hill* (a), the plaintiff was arrested on a *ca. sa.*, and under the duress of his imprisonment was compelled to give up the possession of certain papers. It was contended that he could not sue in respect of the malicious arrest, because it was not alleged to be without reasonable and probable cause, nor was the determination of the suit shown under which the arrest had taken place. It was held, however, that the objection could not prevail, insomuch as the action was not for the malicious arrest, but for abusing the process of the law to effect an object not within its proper scope.

It has also been held that a process in itself perfectly well founded and proper may amount to a legal wrong if vexatiously and unnecessarily repeated. In *Heywood v. Collinge* (b), the defendant caused the plaintiff to be arrested in an action commenced in the Exchequer ; he did not proceed with that action, and the plaintiff was consequently discharged. He then commenced fresh proceedings in the Queen's Bench in respect of the same cause of action, and again arrested the plaintiff. Under these circumstances the Court decided that an action might lie in respect of the second arrest without inquiring into the result of the proceedings. " If an action is not sustainable under such circumstances, we must be prepared to hold that the process of the Court may be abused by a plaintiff for purposes however wanton or malicious. We may suppose the case of a party harassing the defendant under the forms of law by maliciously suing out three writs for the same cause on the same day, and successively arresting the defendant on all three of them. In such a case the principle of the law allows an action, though in form it may have some novelty " (c). So in the case of *Waterer v. Freeman* (d), an action was held to lie against a judgment creditor who, pending an execution, unnecessarily and maliciously seized under a second writ.

Vexatious use
of process.

(a) (1838) 4 Bing. N. C. 212.

(b) (1838) 9 A. & E. 268.

(c) (1838) *per* Coleridge, J., *ibid.*

p. 274.

(d) (1617-9) Hob. 205, 266.

Alberta and Saskatchewan. Even where the information is bad, an action for malicious prosecution will lie for maliciously and without reasonable and probable cause laying an information if the party against whom it is laid is in consequence prejudiced (a).

WHAT IS A PROSECUTION (b).

Ontario. A defendant may render himself liable by assenting to an alteration in the proceedings charging the plaintiff with a crime (c).

New Brunswick. It is not essential that a warrant should have been issued. It is sufficient that the plaintiff has been proceeded against by summons on the defendant's charge (d).

SEARCH WARRANT (e).

Ontario. An action for malicious prosecution will lie for issuing a search warrant without reasonable and probable cause (f).

Where the defendant has fairly stated the facts to a magistrate, he is not liable for the erroneous view of the magistrate that he has jurisdiction to issue a search warrant (g).

HOLDING SELF OUT AS A PROSECUTOR (h).

New Brunswick. Where the prosecution was conducted by the clerk of the peace, but the defendant consulted with him and procured the attendance of witnesses, it was held sufficient evidence that the defendant was the prosecutor (i).

PRINCIPAL AND AGENT: CORPORATION (k).

Ontario. A resolution of the executive committee of a city council authorising the city solicitor to defend actions brought against police officers for their alleged illegal acts does not constitute a ratification thereof by the city corporation so as to make it liable in damages for such acts (l). Where such a resolution is *ultra vires* the legal consequence should be visited, not upon the municipality, but (if at all) upon the offending members (m).

(a) *Powell v. Hiltgen*, 5 Terr. L. R. 16, per Wetmore, J.

(b) P. 641, *supra*.

(c) *Pring v. Wyatt*, 5 O. L. R. 505.

(d) *Vincent v. West*, 1 Han. 290.

(e) Pp. 642, 643, *supra*.

(f) *Young v. Nichol*, 9 O. R. 347, commenting on *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 79, 440.

(g) *Pring v. Wyatt*, 5 O. L. R. 505; cf. *Lucy v. Smith*, 8 U. C. R. 518.

(h) P. 645, *supra*.

(i) *Burgoyne v. Moffat*, 5 All. 13; cf. Upper Canadian case, *Carr v. Proudfoot*, E. T. 3 Vict. (Dig. Ont. Cas. Law. 4088).

(k) P. 645, *supra*.

(l) *Kelly v. Barton, Kelly v. Archibald*, 26 O. R. 608; 22 A. R. 522.

(m) *Gaul v. Township of Ellice*, 3 O. L. R. 438; *McSorley v. Mayer of St. John*, 6 S. C. R. 531, distinguished.

An arrest by a constable appointed by the Government but New paid by the defendant corporation is not sufficient to connect the Brunswick. corporation with the prosecution (a).

A branch bank manager does not seem to have sufficient authority to commit his bank to a malicious prosecution (b).

FAVOURABLE DETERMINATION OF PROSECUTION (c).

Where the proceedings were allowed to drop before the Ontario. magistrate, it was held that no written termination of the proceedings was needed to justify the Court and jury in assuming that the prosecution had terminated favourably (d).

Where the magistrate dismissed the charge of felony, but requested the plaintiff to attend on another day to which he adjourned the case for the purpose of considering whether the plaintiff was guilty of misconduct in the matter, it was held that the determination of the prosecution for felony was sufficiently shown (e).

The books, indictments, and records of the Court of quarter sessions which are in the hands of the clerk of the peace are public documents which everyone who is interested has a right to see, and a defendant who has been tried and acquitted at the sessions is entitled to a copy of the record of acquittal, and it is not necessary to obtain the fiat of the Attorney-General therefor (f).

To the rule that the proceedings must terminate in favour of the plaintiff there appears to be the exception, and apparently the only exception, that where the proceedings are *ex parte*, and the person against whom they are taken has therefore no opportunity to be heard, it is not necessary to allege or prove a determination of the proceedings in his favour (g).

In a recent case Hunter, C.J., in discussing the form of British Columbia.

(a) *Dennison v. Canadian Pacific R. W. Co.*, 36 N. B. R. 250.

(b) *Thompson v. Bank of Nova Scotia*, 32 N. B. R. 335.

(c) P. 647, *supra*.

(d) *Beemer v. Beemer*, 9 O. L. R. 69, following *Reid v. Maybee*, 31 U. C. C. P. 392.

(e) *Sinclair v. Haynes*, 16 U. C. R. 247.

(f) *Rex v. Scully*, *Scully v. Peters*, 2 O. L. R. 315, distinguishing *Reg. v. Ivy*, 24 U. C. C. P. 78, and *Hewitt v. Cane*, 26 O. R. 133. Cf. as to evidence of the proceedings generally, *Lusty v. McGrath*, 6 O. S. 340; *O'Hara v. Dougherty*, 25 O. R. 347; *Baechler v.*

Andrews, 15 C. L. T. Occ. N. 55, record of acquittal must be received in evidence. See also *Aston v. Wright*, 13 U. C. C. P. 14, informal exemplification of indictment; *Hamilton v. Broatch*, 17 O. R. 679, certified copy objected to; *Nourse v. Foster*, 21 U. C. R. 47, secondary evidence; *Timmins v. Wright*, 45 U. C. R. 246, ditto; *Crandall v. Crandall*, 30 U. C. C. P. 497, ditto.

(g) *Per Meredith, C.J.*, in *Bush v. Park*, 12 O. L. R. 183 (1906): held, that the discharge of a person as not insane who had been committed as a lunatic is not a termination in his favour as long as the order of the justice stands committing him.

British
Columbia.

evidence necessary to prove favourable termination of proceedings, said: "I peremptorily decline to follow the invitation of the learned counsel to delve into the technicalities surrounding the drawing up and proof of records which troubled the judges of a generation ago in Ontario" (a).

REASONABLE AND PROBABLE CAUSE: JUDGE AND JURY (b).

Ontario.

Where there is conflicting evidence (c) the jury must be allowed to find the facts (d) and the judge make the inferences (e).

Alberta and
Saskatche-
wan.

The jury find the facts on which the question of reasonable and probable cause depends, but the judge determines whether those facts do constitute reasonable and probable cause (f).

British
Columbia.

If the judge does not think there is evidence to go before the jury, but he nevertheless leaves it to the jury, he must give his judgment on their findings (g).

New
Brunswick.

Where the evidence is conflicting (h), or where inferences are to be drawn from the facts proved, the case must be left to the jury, and the question of "probable cause" should not be determined by the judge alone (i). But, while the jury may be asked to find on the facts from which reasonable and probable cause may be inferred, the inference from the facts found must be drawn by the judge (k).

Nova
Scotia.

A judge is in error if he submits the question of reasonable and probable cause to the jury; that is a question he must decide for himself (l).

The burden of proof of want of reasonable and probable cause is on the plaintiff (m).

The mere dismissal of a charge is no evidence of want of reasonable and probable cause (n).

(a) *Tanghe v. Morgan*, 11 B. C. R. 455.

(b) P. 648, *supra*.

(c) Where no facts in dispute, no jury: *Donnelly v. Bawdon*, 40 U. C. R. 611.

(d) *Hamilton v. Cousineau*, 19 A. R. 203; *Routhier v. McLaurin*, 18 O. R. 112; *Young v. Nichol*, 9 O. R. 347.

(e) *Archibald v. McLaren*, 21 S. C. R. 588; *Martin v. Hutchinson*, 21 O. R. 388; *Wilson v. Tennant*, 25 O. R. 339.

(f) *Wainwright v. Villetard*, 2 West

L. R. 242, *per* Prendergast, J.

(g) *Baker v. Kilpatrick*, 7 B. C. R. 150.

(h) *Vincent v. West*, 1 Han. 290.

(i) *Alward v. Sharp*, 1 Han. 286; *cf. Abell v. Light*, 1 Han. 240.

(k) *Peck v. Peck*, 35 N. B. R. 484.

(l) *Meaney v. Reid*, 1 East L. R. 109 (1906), *per* Townshend, J.

(m) *Raymond v. Biden*, 24 N. S. R. 363, *per* Graham, E.J.

(n) *Ibid.*, *per* Ritchie, J.

EVIDENCE NOT LEGALLY ADMISSIBLE (a).

The defendant may state hearsay evidence relied on by him as Ontario facts (b) on which to base his prosecution.

MISTAKES OF LAW (c).

In considering the question of reasonable and probable cause Manitoba, a defendant may be protected although he was mistaken upon a matter of fact (if his mistake was honest and *bonâ fide*), but not upon a matter of law (d).

ACTING UNDER LEGAL ADVICE (e).

Where a prosecutor has *bonâ fide* taken and acted upon the opinion of counsel in the proceedings taken by him, laying all the facts of the case fully and fairly before such counsel, this is itself evidence to prove reasonable and probable cause (f). But he must take reasonable care to ascertain all the facts and lay them all before the counsel (g).

Where the defendant did not take the advice of counsel in Alberta and laying the information, but afterwards acts on the advice of the criminal prosecutor, he cannot screen himself behind the advice of counsel (h).

The defendant must have used reasonable care to ascertain the facts, have stated them all fairly to the counsel, and acted *bonâ fide* on the opinion before he can claim to be protected by counsel's opinion (i).

It is not sufficient to allege that all the information received has been laid before the magistrate and legal adviser without showing what facts have been laid before them (k).

In one case the plaintiff joined as a defendant the solicitor on whose advice the prosecution was started, but the judge withdrew the case as against him on the ground that there was no evidence against him (l).

(a) P. 652, *supra*.

(b) See *Bernard v. Coutellier*, 45 U. C. R. 453.

(c) P. 654, *supra*.

(d) *Rex v. Stewart*, 6 M. L. R. 257.

(e) P. 654, *supra*.

(f) *Martin v. Hutchinson*, 21 O. R. 388; *Fellowes v. Hutchinson*, 12 U. C. R. 633.

(g) *St. Denis v. Shoultz*, 25 A. R. 131; *Scougall v. Stapleton*, 12 O. R. 206;

McGill v. Walton, 15 O. R. 389.

(h) *Colwill v. Johnson*, 1 West L. R. 218, *per* Wetmore, J.

(i) *Wilson v. City of Winnipeg*, 4 M. L. R. 193; *Rex v. Stewart*, 6 M. L. R. 257.

(k) *Rogers v. Clark*, 13 M. L. R. 189.

(l) *Leary v. Sutton*, 27 N. S. R. 278: nice distinction drawn between taking legal advice and taking counsel's opinion in England.

BELIEF (a).

Nova Scotia. Although the defendant believes the charge, he may still be acting maliciously (b).

MALICE (c).

Ontario. The absence of reasonable and probable cause does not necessarily establish that malice which is requisite to maintain the action (d).

Nova Scotia. Malice will not be presumed; there must be a finding as a fact by the jury of actual or real malice (e).

INDIRECT MOTIVES (f).

Ontario. Evidence of the motive which induced the defendant to lay a charge is material, and should not be rejected (g).

Manitoba. Indirect motives are evidenced by instituting a criminal prosecution to save the expense of a civil suit (h), or by proceedings not with a view to punishing an abductor, but to regain possession of the child (i).

MALICIOUS DETENTION (k).

New Brunswick. An action will not lie for maliciously and without probable cause detaining the plaintiff in prison after payment of the debt for which he was arrested, unless a legal determination of the suit is shown, or the plaintiff had been ordered to be discharged by the Court (l).

(a) P. 655, *supra*.

(b) *Hawkins v. Snow*, 28 N. S. R. 259; see also 27 N. S. R. 408; 29 N. S. R. 444.

(c) P. 657, *supra*.

(d) *Winfield v. Kean*, 1 O. R. 193.

(e) *Grant v. Booth*, 25 N. S. R. 266.

(f) P. 657, *supra*.

(g) *McCann v. Preneveau*, 10 O. R.

573.

(h) *Miller v. Manitoba Lumber and Fuel Co.*, 6 M. L. R. 487.

(i) *Rex v. Stewart*, 6 M. L. R. 257.

(k) P. 660, *supra*.

(l) *McPhelan v. Welden*, 5 All. 35.

Cf. Nova Scotia case, *Hennessey v. Farquhar*, 35 N. S. R. 22.

CHAPTER XX.

FRANCHISES.

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A **FRANCHISE** is “a royal privilege or branch of the king’s prerogative subsisting in the hands of a subject. . . . It is . . . a franchise for a number of persons to be incorporated and subsist as a body politic. . . . Other franchises are . . . to have waifs, wrecks, estrays, treasure trove (a), royal fish, forfeitures, and deodands ; . . . to have a fair or market, with the right of taking toll either there or at any other public places, as at bridges, wharfs, and the like . . . or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty” (b).

Franchise defined.

“Disturbance of franchises happens when a man has a franchise of holding a court-leet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays . . . and he is disturbed or incommoded in the lawful exercise thereof. As if another by distress, menaces, or persuasions, prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market; or hunts in my free warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes and is carried out of my liberty; in every case of this kind . . . there is an injury done to the legal owner; his property is damnified, and the profits arising from such his franchise are diminished. To remedy which, as the law has given no other writ, he is, therefore, entitled to sue for damages by a special action on the case” (c).

Disturbance of franchise.

Many of the franchises mentioned in the above passages are

(a) *Attorney-General v. Trustees British Museum*, (1903) 2 Ch. 598.

(b) Bl. Com., Vol. 1, pp. 37-8.

(c) Bl. Com., Vol. 3, pp. 236-7.

practically obsolete. In respect of others the methods of infringement are obvious, and do not require special consideration. It is only necessary to deal here with the franchises of markets, fairs, and ferries.

Markets and fairs.

A franchise of a market consists in the exclusive right to invite a concourse of buyers and sellers, either of goods generally or of particular kinds of goods, at certain appointed times, either to a certain spot marked out by metes and bounds or to some spot to be appointed within the limits of a town or parish. A fair does not appear to differ in its legal incidents from a market (a), though the latter is less than the former (b). It is in fact simply a special kind of market held yearly or half-yearly. Ancient fairs and markets exist by charter and prescription. In modern times, however, they are usually created by Act of Parliament. By 38 & 39 Vict. c. 55, ss. 166—7, urban authorities have power to establish markets, subject to the provisions of the Markets Clauses Act (c).

Right of lord of market.

With regard to markets by grant from the Crown, the right of the lord of the market is to restrain buying and selling which interferes with his monopoly. In certain cases the mere interference is of itself actionable; in others the buying and selling must be, as it is termed, in fraud of the market. But if once the disturbance of an existing market is proved, the absence of fraudulent intention on the part of the defendant is no bar to action (d).

Setting up rival market.

It is a clear disturbance of a market to set up a rival emporium, and to invite a concourse of buyers and sellers for the purpose of trafficking in articles of the same kind as those for which the market is held (e). An auctioneer who conducts public sales of tollable goods may be guilty of a disturbance, and so may the owner of the premises on which the auction takes place, provided he let them for the purpose (f). It has been laid down (g) that a rival market held on any day within seven miles of the old

(a) 2 Inst. 406.

(b) Gunning on Tolls, p. 44.

(c) 10 & 11 Vict. c. 14.

(d) *Wilcox v. Steel*, (1904) 73 L. J. Ch. 217, C. A.

(e) *Great Eastern R. Co. v. Goldsmid*,

(1884) 9 App. Cas. 927.

(f) *Mayor of Dorchester v. Easor*.

(1869) L. R. 4 Ex. 335.

(g) *Yard v. Ford*, (1670) 2 Wm. Saund. 172.

market *may* be a disturbance, while if held on the same day as the old market it *must* be a disturbance. This statement of the law was recognised as correct in the opinion given by the judges on the Islington Market Bill (a). It has, indeed, been suggested that this rule does not apply at the present day, and the limit of protection to be given must depend upon the public requirements in each particular case (b). The suggestion, however, receives no countenance from a recent and authoritative case on the subject (c); in which it was held that it is no defence to an action for disturbance by a rival market that the old market provides insufficient accommodation. It makes no difference whether the new market be set up without colour of right or under the authority of a charter from the Crown, for the Crown cannot derogate from the grant already made in respect of the old market (d). The fulfilment of a contract made at a market to deliver tollable goods at a future date within the market limits, is not, however, apparently an offence within sec. 13 of the Markets and Fairs Clauses Act, 1847 (e). The remedy in the case of insufficient accommodation is to revoke the whole charter if the grantee wilfully neglects to provide for the public need; while if it appears, after due inquiry, that he is unable to do so, the Crown may then lawfully grant a supplementary market (f).

Insufficiency
of old market.

Under ordinary circumstances it is no disturbance of a market if the neighbouring tradesmen carry on their business in the ordinary way, even though the effect be to diminish the resort of customers to the market (g). Apparently, however, a sale of *Tollable* goods, by a person without a hawker's licence, to others than regular customers, from a cart at a distance from the shop of the tradesman to whom the cart belongs, amounts to a disturbance of market (h). But where there is an exposure for sale, by a licensed hawker, of *Tollable* goods not requiring a hawker's

Selling in
shops.

(a) (1835) 3 Cl. & F. 513.

(b) *Per Cur.*, *Newton v. Cubitt*, (1862) 12 C. B. N. S. p. 60.

(c) *Great Eastern R. Co. v. Goldsmid*, (1884) 9 App. Cas. 927.

(d) *Islington Market Bill*, (1835) 3 Cl. & F. 513.

(e) *Gracey v. Banbridge Urban*

Council, (1905) 2 Ir. R. 209.

(f) *Islington Market Bill*, *supra*.

(g) *Mayor of Manchester v. Lyons*, (1883) 22 Ch. D. 287.

(h) *Ross v. Taylerson*, (1898) 62 J. P.

181; *O'Dea v. Crowhurst*, (1899) 80 L. T.

491; *Woolwich Corporation v. Gibson*,

(1905) 92 L. T. 538.

licence, although such sale may amount to a disturbance of market, the fact of the vendor being a licensed hawker will nevertheless afford him the protection given by sec. 14 of the Markets and Fairs Clauses Act, 1847 (a).

It does not, however, amount to an exposure for sale for a tradesman's messenger to call upon regular customers for orders even if he take the goods with him (b).

Certain ancient markets, however, have an absolute monopoly within the limits of the town or parish during market hours, and any sale infringing this monopoly will be an actionable disturbance (c). It is apprehended that at the present day such a restriction of the rights of individuals could only be established by an Act of Parliament.

Fraud on
market.

No one, however, has a right to bring his goods to a market for the purpose of finding customers and then to refuse payment of the toll which is the consideration for the benefit he receives. To do so is a disturbance of the market, and it makes no difference whether he come within the precincts of the market or not (d).

In *Bridgland v. Shapter* (e) the defendant was in the habit of bringing his goods to a place forty yards outside the limits of the market; he then went within the market in quest of customers, brought them to the spot and there bargained with them. It was held that an action lay against him for disturbance on "the general principle of law that whenever a person seeks to take the benefit of a market without payment of the toll, that is a fraud upon the market" (f). In cases of this kind the gist of the action is not the mere selling, but the intention to defraud the lord of his dues. "If a person merely comes to a town to sell a commodity, and it happens to be a market-day there, that would not

(a) *Llandudno Urban Council v. Hughes*, (1900) 1 Q. B. 472.

(b) *Newton-in-Makerfield Urban Council v. Lyon*, (1900) 81 L. T. 756.

(c) *Mosley v. Walker*, (1827) 7 B. & C. 40; *Mayor of Macclesfield v. Pedley*, (1833) 4 B. & Ad. 397; *Mayor of Peuryn v. Best*, (1878) 3 Ex. D. 292. Cp. *Mayor of Macclesfield v. Chapman*, (1843) 12 M. & W. 18.

(d) The passage above quoted from Bl. Com. treats the refusal to pay toll on goods in the market as a wrong. The ordinary remedy, however, is to sue in contract for the toll as such. See *per* Lord Tenterden, C.J., *Mayor of Newport v. Saunders*, (1832) 3 B. & Ad. p. 412.

(e) (1839) 5 M. & W. 375.

(f) *Per* Lord Abinger, C.B., *ibid.* p. 382.

be a disturbance of the market, because the act must be done designedly and with an intention to obtain the benefit of the market without payment of toll" (a).

If a man brings goods to a market and cannot obtain accommodation there, he has a right to sell them outside without payment of toll. In this case the individual seller stands on a different footing to the person setting up a rival market (b). In the recent case of *Newcastle (Duke of) v. Workson Urban Council* (c), it was held that the fact of a fair and market being held on the same day gave the lord of the fair no right to require an account of enhanced tolls for stallage, charged by the lessees of the market on the particular days when the holding of the annual fair and the weekly market were coincident.

Although statutory markets are usually protected against disturbance by special enactments, yet an action for disturbance lies on the same principles as in the case of market by grant from the Crown (d). The Markets Clauses Act contemplates "prescribed limits" of protection (e). It may therefore be that anything done outside such limits, though within seven miles, would not be a disturbance.

Statutory
markets.

A franchise of a ferry confers the exclusive right of carrying for hire goods and passengers by means of boats (f) across a river or arm of the sea from a defined *terminus* on the one side of the water to a defined *terminus* on the other. The right may be to carry forwards and backwards, or one way only (g). It seems at one time to have been considered that where an ancient ferry constituted a means of communication between two towns or parishes it might confer a monopoly in the traffic, and that therefore no other person might knowingly ferry anyone journeying between the towns or parishes in question, even though by so

Ferries.

(a) *Per Martin, B., Mayor of Brecon v. Edwards*, (1862) 1 H. & C. p. 63.

(b) *Prince v. Lewis*, (1826) 5 B. & C. 363; see *Great Eastern R. Co. v. Goldsmid*, (1884) 9 App. Cas. 927. And see *Wilcox v. Steel*, (1908) 67 J. P. 261.

(c) (1902) 2 Ch. 145.

(d) *Bridgland v. Shapter*, (1839) 5 M. & W. 375; *Mayor of Manchester v. Lyons*, (1883) 22 Ch. D. 287.

(e) 10 & 11 Vict. c. 14, s. 13. As to the meaning of "prescribed limits," see *Caswell v. Cook*, (1862) 11 C. B. N. S. 637.

(f) The owner of a ferry cannot substitute a bridge; see *Payne v. Partridge*, (1691) 1 Salk. 12.

(g) *Pim v. Curell*, (1840) 6 M. & W. 234.

doing he afforded a shorter and better line of communication (a). This view of the law, however, seems not altogether consistent with the principles laid down in *Newton v. Cubitt* (b). The plaintiffs were the lessees of a ferry from the Isle of Dogs to Greenwich, which at one time had formed the only means of communication between those places. The defendants had built a pier 1,282 yards from the ferry, and in connection with it had established steam communication to the opposite side of the river, with the view of accommodating the inhabitants of a district recently built over. The plaintiffs alleged that this was a disturbance of their franchise, inasmuch as they had a right to ferry everyone going from the Isle of Dogs to Greenwich. But, said the Court, "the nature of the franchise seems to be repugnant to the plaintiffs' claim of a ferry from every part of the isle indiscriminately. A ferry exists in respect of persons using a right of way, where the line of way is across water. . . . The ferry is unconnected with the occupation of land, and exists only in respect of persons using the right of way. The questions whence they come, and whither they go, are irrelevant to the exercise of that right: and the ferryman has no inchoate right in respect of any of them, unless they come to his passage" (c). The principles here laid down seem to have been accepted by the Court of Appeal in *Hopkins v. Great Northern R. Co.* (d), and it follows, apparently, that the franchise is disturbed by a rival ferryman only in those cases where he carries in the line of the old ferry, or where he sets up a new line of passage, not for the purpose of affording better communication to the public, but for the purpose of defrauding the old ferry (e).

What is a disturbance.

New line of communication.

If a new line of communication is made, part of which is a bridge, and a ferry is thereby interfered with, there is no right of action. It has even been doubted whether it is not lawful to erect a bridge in the very line of the old ferry (f).

Insufficiency of ferry.

The mere fact that the ferryman does not perform his duty

(a) See *Huzzey v. Field*, (1835) 2 C. M. & R. 432.

(b) (1862) 12 C. B. N. S. 32.

(c) *Newton v. Cubitt*, (1862) 12 C. B. N. S. pp. 57-8.

(d) (1877) 2 Q. B. D. 224.

(e) *Cowes Urban District Council &*

East Cowes Urban District Council v. Southampton & Isle of Wight Royal Mail Steam Packet Co., Ltd., (1905) 2 K. B. 287.

(f) *Hopkins v. Great Northern R. Co.*, (1877) 2 Q. B. D. 224, at p. 233.

properly by providing fit means of passage, is not in itself an answer to an action for a disturbance (*a*).

It is the duty of the ferryman to provide sufficient accommodation for the public, and an action lies against him for any special damage caused by a breach of this duty (*b*). He is bound to provide, not merely for the safe ferrying, but for the safe embarking and disembarking of his passengers and their property (*c*). This duty appears to be, not to insure, but merely to use proper care and skill (*d*).

Duty of
ferryman.

So the lord of a market is bound to take care that his premises are in a safe condition (*e*), and is bound also, it is apprehended, to provide accommodation for all wishing to attend his market to the extent of the space at his disposal (*f*).

Duty of lord
of market.

- (*a*) *Peter v. Kendal*, (1827) 6 B. & C. 703. (*d*) *Willoughby v. Horridge*, *supra*.
 (*b*) *Payne v. Partridge*, (1691) 1 Salk. 12. (*e*) *Laz v. Corporation of Darlington*, (1879) 5 Ex. D. 28.
 (*c*) *Willoughby v. Horridge*, (1852) 12 C. B. 742; but see *Walker v. Jack-* (*f*) *Islington Market Bill*, (1875) 3 Cl. & F. 513.

Canadian Notes to Chapter XX.

FRANCHISES.

FRANCHISES OF MARKET (*a*).

It is *intra vires* the Provincial Legislature to authorise a municipal corporation to license and regulate the sale, outside the public market, of provisions usually sold in markets (*b*).

The validity of a considerable number of municipal by-laws has been tested, *e.g.*, by-laws prohibiting the sale of certain provisions except at the public market (*c*), within certain hours (*d*), or within certain distances (*e*), or without having

Canada.

Ontario.

- (*a*) P. 667, *supra*.
 (*b*) *Pigeon v. Recorder's Court and City of Montreal*, 17 S. C. R. 495; *Angers v. City of Montreal*, 24 L. C. Jur. 259; *Mallette v. City of Montreal*, 24 L. C. Jur. 263; cf. *Harris v. City of Hamilton*, 44 U. C. R. 641.
 (*c*) *Re Kelly and City of Toronto*, 23 U. C. R. 425; *O'Meara v. City of Ottawa*, 14 S. C. R. 742.
 (*d*) See *Peters v. President and Board of Police of London*, 2 U. C. R. 543, held good; *In re Fennell and Town of Guelph*, 24 U. C. R. 238, held bad; *Re Wilson and Town of St. Catherine's*, 21 U. C. C. P. 462.
 (*e*) See *Re McLean and Town of St. Catherine's*, 27 U. C. R. 603; *Re Snell and Town of Belleville*, 30 U. C. R. 81.

Ontario. paid the market toll (a), or without using a particular kind of wagon (b).

FERRIES (c).

Canada. There is a Dominion and a provincial jurisdiction in ferries. In the Dominion Ferries Act (now R. S. C. 1906, c. 108) "ferry means any ferry between any province and any British or foreign country or between any two provinces" (d).

DEFINED TERMINUS (e).

The establishment and use of a ferry within certain limits for a number of years may be held to fix the termini of the ferry (f).

FORM OF GRANT: FORWARDS AND BACKWARDS (g).

Canada. A licence granted by the Crown giving the right to ferry "between the town of Belleville to Ameliasburg" was held a sufficient grant of a right of ferriage *to and from* the two places named (h).

Informality may kill the sufficiency of a ferry right, as where the authorisation consisted in a letter from the governor's secretary (i) or in a sub-lease from the Crown licensee (k).

A subsequent grant of ferry right to another person may be equivalent to a revocation of the former grant (l). But a corporation charter giving the municipality power to establish and regulate ferries does not take away or allow interference with a ferry right previously granted by the Crown (m). If the rights of the licensee are prejudiced by subsequent licences his remedy is a writ of *scire facias* to repeal same (n).

(a) *Re Kinghorn and City of Kingston*, 26 U. C. R. 130, held bad.

(b) *Reg. v. Smith*, 4 O. R. 401.

(c) P. 670, *supra*.

(d) Held *intra vires*, *In re International and Interprovincial Ferries*, 36 S. C. R. 206 : held also that licence may be exclusive ; cf. *Smith v. Ratté*, 15 Gr. 473, 13 Gr. 626, ferry between Ontario and Quebec ; *Kirby v. Lewis*, 6 O. S. 207, ferry between Canada and U.S. ; *Reg. v. Davenport*, 16 U. C. R. 411 ; but see *Perry v. Clergue* (1903), 5 O. L. R. 357, as to provincial jurisdiction ; *Dinner v. Humberstone*, 26 S. C. R. 252 ; *Longueuil Navigation Co. v. City*

of Montreal, as to municipal jurisdiction.

(e) P. 670, *supra*.

(f) *Anderson v. Jellett*, 9 S. C. R. 1 ; cf. *Fraser v. Drynan*, 4 All. 74.

(g) See p. 670, *supra*.

(h) *Anderson v. Jellett*, 9 S. C. R. 1.

(i) *Jones v. Fraser*, 6 O. S. 426.

(k) *Higgins v. Hagan*, 7 U. C. R. 401, right still in licensee.

(l) *Reg. v. Davenport*, 16 U. C. R. 411.

(m) *University of New Brunswick v. McCluskey*, 6 All. 136.

(n) *Brigham v. The Queen*, 6 Ex. C. R. 414 ; 30 S. C. R. 620.

WHAT IS A DISTURBANCE (a).

It is not necessary to prove that the defendant either received or claimed any hire or payment (b). But a person may use his own boat without showing his motives or occasion for allowing any person to pass in his boat provided such person be not a traveller and nothing be charged for carrying (c). Ontario.

In an action for disturbance particulars may be ordered as to the number of passengers, goods, &c., carried (d).

FERRY AND BRIDGE (e).

Where the plaintiffs were bound to maintain a bridge, and in case of its being put out of use to maintain a ferry, a temporary bridge built by the defendants was held an infringement (f). Canada.

INSUFFICIENCY OF FERRY (g).

The omission to furnish full accommodation to any number of persons offering themselves to be ferried over is no defence to an action for a disturbance of an admitted right (h).

DUTY OF FERRYMAN (i).

Where the ferryman is a municipal corporation an action will lie against the corporation for injuries caused by the negligence of the officers of the boat (k). Canada.

SOME STATUTES AFFECTING FERRIES.

R. S. C. 1906, c. 108 (The Ferries Act).

R. S. O. 1897, c. 139 (Ferries). Canada.

3 Edw. VII. c. 19 (Consolidated Municipal Act), s. 332, grant by council of exclusive privileges in ferry; s. 591 (c), by-laws for construction, &c., of ferries. Ontario.

C. O. N. W. T. 1898, c. 18 (The Ferries Ordinance).

Alberta and
Saskatche-
wan.

(a) P. 671, *supra*.

579.

(b) *Burford v. Oliver*, Dra. 9; cf. *Jones v. Fraser*, 6 O. S. 426, for the effect of plaintiff not receiving the hire for himself.

(g) P. 671.

(h) *Hickley v. Gildersleeve*, 10 U. C. C. P. 460.

(i) P. 672, *supra*.

(c) *Ives v. Calvin*, 3 U. C. R. 464.

(k) *St. John v. Macdonald*, 14 S. C. R. 1; for distinction between ferryman and common carrier as to goods, see

(d) See *Ives v. Calvin*, 1 C. L. Ch. 8.

(e) P. 671, *supra*.

(f) *Galarneau v. Guilbault*, 16 S. C. R.

Roussel v. Aumais, Q. R. 18 S. C. 474.

British
Columbia.
Manitoba.

R. S. B. C. 1897, c. 78 (Ferries Act).

R. S. M. 1902, c. 116 (The Municipal Act), s. 369, grant by council of exclusive privileges in any ferry, &c.

New
Brunswick.

C. S. N. B. 1903, c. 165 (The Municipalities Act), s. 95 (11), by-laws as to ferries; c. 186, respecting anchorage for ferry wires.

Nova
Scotia.

R. S. N. S. 1900, c. 83 (Ferries).

CHAPTER XXI.

INCORPOREAL PERSONAL PROPERTY.

PART I.—COPYRIGHT.

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THE producer of an original literary or artistic work—using the terms in their very broadest sense—has, of course, the same right in the manuscript, or other concrete form in which he embodies his thought, as he has in any other of his chattels, but he has besides the right to prevent others from turning to their own use and advantage the invention and labour which he has bestowed thereon. And this right is of two kinds, one existing by the common law until he has published his work to the world at large (*a*), and the other by statute after such publication (*b*).

Literary and artistic property.

“The author of a literary composition which he commits to paper belonging to himself, has an undoubted right at common law to the piece of paper on which his composition is written, and to the copies which he chooses to make of it for himself, or for others. If he lends a copy to another, his right is not gone; if he sends it to another under an implied undertaking that he is not to part with it, or publish it, he has a right to enforce that

Literary property at common law.

(*a*) See *Exchange Telegraph Co. v. Gregory*, (1896) 1 Q. B. 147, where the plaintiffs were held to have a common law right of property in information collected by them as to the prices of various stocks and shares, and communicated by them privately to their

subscribers.

(*b*) In dramatic pieces, however, under 3 & 4 Will. IV. c. 15, and works of art under 25 & 26 Vict. c. 68, there seems to be a statutory copyright before publication.

undertaking" (a). "If an author chooses to impart his manuscript to others without general publication, he has all the rights for disposing of it incident to personalty. He may make an assignment, either absolute or qualified in any degree. He may lend, let, or give, or sell any copy of his composition, with or without liberty to transcribe, and if with liberty of transcribing he may fix the number of transcripts which he permits. If he prints for private circulation only he has still the same rights" (b). Where, however, a newspaper proprietor or editor receives a report of a matter of public interest from a journalist, and, instead of reproducing it *verbatim*, extracts its substance and inserts it in his journal in a new or largely modified form, it has been held that the copyright therein vests in the person who has remodelled the article, and not in the original contributor (c).

Letters.

The writer of letters, even of a familiar character, whatever may be the nature of his right in respect of the manuscript itself, has so far a literary property that he can restrain the recipient from multiplying and circulating copies, except in so far as the purposes of justice may require (d). It is not a sufficient justification of such publication that the recipient thinks it necessary for the purpose of vindicating his character (e), though it may be otherwise where he seeks to rebut imputations cast by the writer of the letters (f).

Lectures.

If a man delivers a lecture or address to a selected number or limited class of persons he does not thereby so far publish his composition as to lose his common law right to restrain its publication by other people (g), the understanding between him and his auditors being that they may avail themselves of what they hear for their own benefit, but not reproduce it for the outside public (h). So it has been held that the public performance

(a) *Per Parke, B., Jefferys v. Boosey*, (1854) 4 H. L. C. pp. 919-20.

(b) *Per Erle, J., ibid.* pp. 867-8.

(c) *Springfield v. Thame*, (1903) 89 L. T. 242.

(d) *Gee v. Pritchard*, (1818) 2 Swanst. 402.

(e) *Ibid.*

(f) *Perceval v. Phipps*, (1813) 2 V. & B. 19.

(g) As to statutory copyright in

lectures, see 5 & 6 Will. IV. c. 63. which, however, for all practical purposes seems to add very little to the protection given to the lecturer by the general law.

(h) *Abernethy v. Hutchinson*, (1824) 1 H. & T. 28; *Nicols v. Pitman*, (1844) 26 Ch. D. 374; *Caird v. Sims*, (1847) 12 App. Cas. 326. In the first of these cases, Lord Eldon doubted whether protection could be given to a mere ora-

of a play does not amount to its publication as a literary composition (a). On the other hand, a speech, sermon, address, or lecture, may be addressed to the public at large, and its delivery under such circumstances will be a publication depriving the author of any right at common law and leaving him only his statutory copyright. Apparently, however, in the absence of any claim by the lecturer to the copyright of his speech under the Lectures Copyright Act, 1885, the copyright, throughout the British dominions (b), in *verbatim* reports of public speeches, vests in the reporter, who, by virtue of his shorthand notes and subsequent transcription, becomes the "author" of the report of such speech within the meaning of ss. 2, 3, 18, of the Copyright Act, 1842 (c).

The painter of a picture has a right at common law to restrain people from copying his picture, and he does not lose this right by exhibiting it to the public on the express or implied terms that they are simply to view and not to copy (d). Pictures.

So long as a man keeps his literary or artistic property unpublished to the world at large, any violation of the privacy which he chooses to maintain is a wrong. If, for instance, he has a collection of drawings, not merely may not the drawings themselves be copied, but it is unlawful to publish a descriptive catalogue of them (e). Remedy at common law.

Copyright, in the proper sense of the term, means the right which after publication the producer retains to multiply copies. Copyright in books is now regulated (f) by 5 & 6 Vict. c. 45, commonly known as Talfourd's Act (g). It is property in the strict sense and assignable (h). Copyright in books.

By this Act copyright in every book published in the lifetime Duration.

communication, of which no manuscript existed, in the same way as it is accorded to a literary composition, but he did so, apparently, not on any ground of principle, but only because there was a difficulty in discovering the exact form of the spoken words and effecting a fair comparison between them and the alleged piracy.

(a) *Macklin v. Richardson*, (1770) Amb. 694.

(b) 5 & 6 Vict. c. 45, s. 29.

(c) *Walter v. Lane*, (1900) A. C. 539

(d) *Turner v. Robinson*, (1860) 10 Ir. Ch. Rep. 121 and 510.

(e) *Prince Albert v. Strange*, (1848) 2 De G. & Sm. 652.

(f) Except in cases of copyrights belonging to certain universities and colleges, as to which, see 15 Geo. III. c. 53.

(g) Repealing 8 Ann. c. 19.

(h) s. 25.

of its author is to endure for the natural life of the author and seven years afterwards or for forty-two years, whichever period is the longer, and is to be the property of the author and his assigns: and copyright in books first published after the death of the author is to endure for forty-two years, and is to be the property of the proprietor of the author's manuscript and his assigns (a). In the case of contributions to encyclopædias and periodicals the right remains in the proprietor for twenty-eight years, and then reverts to the contributor for the rest of the period. The proprietor has no right of publishing the contributions separately. The writer may reserve to himself the right of separate publication, in which case his right and that of the proprietor will be concurrent (b).

What is a book.

The term "book" is defined to include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan published separately (c). Engravings which, by reason of the provisions of the Acts relating to copyright in engravings not having been complied with, would be unprotected if published separately, will, nevertheless, be protected under this Act if bound up in a volume, even though the letterpress which they illustrate is not itself the subject of copyright (d), and, indeed, even though there be no letterpress at all (e). A volume is none the less a book within the Act because it is published only as an advertisement and not for sale (f).

Titles of books.

The name of a book is no part of the book itself for the

(a) s. 3. S. 17 of the Act of 1842 prohibits the importation into any part of the United Kingdom or its dependencies, for the purpose of sale or hire, of any printed book (copyrighted in the United Kingdom) which may have been reprinted in any country or place outside the British Dominions (*Imperial Book Co., Ltd. v. Adam & Chas. Black & The Clarke Co., Ltd.*, (1905) 21 T. L. R. 540, P. C.).

(b) s. 18.

(c) s. 2. Catalogues and lists of articles for sale are books: *Collis v. Cater*, (1898) 78 L. T. 613. But a cardboard pattern of a sleeve, contain-

ing upon it scales, figures, and descriptive words for adapting it to sleeves of any dimensions is not within the section: *Hollinrake v. Truswell*, (1894) 3 Ch. 420.

(d) *Bogue v. Houlston*, (1852) 5 De G. & Sm. 267. Electrotpe reproductions of fashion plates are "engravings": *Marshall v. Bull*, (1901) 85 L. T. 77.

(e) *Per Jessel, M.R., Maple & Co. v. Junior Army & Navy Stores*, (1882) 21 Ch. D. p. 378.

(f) *Maple & Co. v. Junior Army & Navy Stores*, (1882) 21 Ch. D. 369; and see *Collis v. Cater*, *supra*.

purposes of copyright (a), and, therefore, practically it cannot be the subject of copyright, for the subject of copyright must be an original work, and a mere name can never be sufficiently original for this purpose (b).

Registration of a book at Stationers' Hall is a condition precedent to a right to sue for infringement of copyright (c). There is no time limited within which registration must be made, but there can be no effective registration before publication (d). Non-registration only affects the right to sue, it does not affect the copyright (e), which vests in the author *ipso facto* immediately upon the publication; therefore non-registration at the time of piracy committed is no defence (f). Registration.

What amounts to a publication has nowhere been defined, and the question appears to be one of fact. The cases, however, show that a limited, partial, or conditional publication is not a publication within the meaning of the Act (g). It must be made by or on behalf of the author or his assignee. In *Clementi v. Walker* (h) it was held that a publication made with the permission of the author but not on his behalf, and without any assignment, conferred no right on the author or the person publishing. Publication.

The publication must take place within the United Kingdom. The Act does not indeed say so in terms, but the inference is drawn from various provisions in the statute, such, for instance, as the provision that within one month after demand in writing the publisher shall deliver copies to certain libraries in the United Kingdom (i), a provision which is inconsistent with the publication being at the Antipodes (k). In *Jefferys v. Boosey* (l), which was decided on the repealed statute of Anne, Lord St. Leonards thought the work must not only be published but also Place of publication.

- (a) *Dicks v. Yates*, (1881) 18 Ch. D. 40 Ch. D. 425.
 76; overruling *Weldon v. Dicks*, (1878) (d) *Henderson v. Maxwell*, (1876-7)
 10 Ch. D. 247, on this point. 5 Ch. D. 892.
 (b) *Dicks v. Yates*, (1881) 18 Ch. D. (e) s. 24.
 76. As to fraudulent use of a title, see (f) See *Johnson v. George Newnes, Limited*, (1894) 3 Ch. 663.
 (c) s. 24. Where a work is published (g) See above, pp. 673-5.
 in parts registration of the first number (h) (1824) 2 B. & C. 861.
 suffices: s. 19. With regard to news- (i) s. 8.
 papers, see *Walter v. Howe*, (1881) 17 (k) *Routledge v. Low*, (1868) L. R. 3
 Ch. D. 708; *Trade Auxiliary Co. v. H. L. 100.*
Middlesborough and District Trades- (l) (1854) 4 H. L. C. pp. 983-4.
men's Protection Association, (1888-9)

printed in the United Kingdom, on the ground that there was a presumption that the legislature intended to give employment to British labour and capital. There was nothing more in the language of the former Act to warrant this view than is to be found in the later, but whether the Courts will so decide when the question arises upon the later Act must be regarded as very doubtful. Where copyright exists the area within which protection is given to it extends over the whole British dominions (a).

Effect of
publication
abroad.

It was not at one time clear whether a prior publication outside the United Kingdom would under all circumstances operate to prevent the acquisition of a copyright by a subsequent publication within the kingdom, although it was doubted in *Clementi v. Walker* whether the mere fact of external publication necessarily made a work *publici juris* (b). However, it was provided by 7 & 8 Vict. c. 12, s. 19, that the author of a book could have no copyright, except under the provisions of that Act, if he first published out of her Majesty's dominions. This left the question open as to the effect of a publication in India or the colonies; but now by 49 & 50 Vict. c. 33, s. 8, the English Copyright Acts are made to apply to a literary or artistic work first produced in a British possession in like manner as they apply to a work first produced in the United Kingdom. It has, moreover, been decided in the modern case of *Baschet v. London Illustrated Standard Co.* (c) that the protection afforded by this Act in Great Britain and Ireland extends to foreign as well as to colonial authors or artists, provided the claimant is able to show, to the satisfaction of the Court, that he is entitled to a like protection in the country of origin, the joint effect of s. 2, sub-s. 3, of the International Copyright Act of 1886 and of article 2 of the Berne Convention, 1887, being to provide, in cases where all requisite formalities have been complied with, that "authors of any of the countries of the Union . . . shall enjoy in the other countries for their works . . . the rights which the respective laws . . . grant to natives" (d).

Foreign
authors.

(a) *Routledge v. Low*, *supra*, p. 678 ;
and see 5 & 6 Vict. c. 45, s. 29.

(b) *Per Cur.*, (1824) 2 B. & C. p. 870.

(c) (1900) 1 Ch. 73.

(d) On Aug. 1st, 1904, Sweden
acceded to the International Copyright
Convention, 1886.

In the case of pictures, drawings, photographs, or other works of a cognate character produced in the colonies, the effect of the Imperial Fine Arts Copyright Act, 1862, is to confer on persons resident in the British dominions beyond the seas an absolute copyright in their works throughout the United Kingdom, without giving any reciprocal advantage to the inhabitants of the British Islands. Consequently, while a work of art produced in the colonies is copyright in Great Britain, a work of art produced in these islands may be pirated with impunity in its dependencies (a). Colonial copyright.

Little or no originality is required in order to constitute a person an author within the meaning of the Act. A stenographer who reports a speech *verbatim* is the "author" of his report (b). Even in works of some literary pretension, it is enough if the author has employed skill and labour in arranging and adapting old material in a new form. Thus, if an opera score be arranged for the pianoforte, the arrangement is an independent composition, of which the arranger and not the original composer is the author (c). So a mere compilation may be an independent work. A school book is a presentation in a special form of a certain portion of the common stock of knowledge. It will probably not contain a single new fact or notion, but it may be undoubtedly the subject of copyright (d). Consequently the author of a subsequent work on the same subject must, in order to protect himself from a charge of piracy, arrange his matter in a sufficiently novel form to prevent his compilation from being a colourable imitation of the one which preceded it (e). The law goes still farther, for it protects works in which there is no element of literary skill or arrangement, but to which the author simply contributes the labour of collecting common and undisputed facts. Of this kind of work a directory is a familiar example (f). But although the fact that a work is only Originality.

(a) *Graves v. Gorrie*, (1903) A. C. 496. 86 L. T. 465, A. C.

(b) *Ibid.*

(c) *Wood v. Boosey*, (1868) L. R. 3 Q. B. 223.

(d) *Jarrolld v. Houlston*, (1857) 3 K. & J. 708.

(e) *Moffatt & Paige v. Gill*, (1902)

(f) *Kelly v. Morris*, (1866) L. R. 1 Eq. 697; *Lamb v. Evans*, (1893) 1 Ch. 218; *Exchange Telegraph Co. v. Gregory & Co.*, (1896) 1 Q. B. p. 157. But a work of this kind will not be considered original unless a substantial amount of independent labour has been expended

in a very small degree original will not serve to deprive it of copyright, it will be very material when it comes to be inquired what is an infringement. The copyright protects not the whole of the work but only its original element (a).

No copyright
in piracy.

When it is said that a mere new disposition of existing materials may be original, this must be taken with the limitation that the materials are such as may be lawfully used. There can, it is apprehended, be no right to protection for that which is itself a piracy. An arrangement of an opera score for the piano may be an original work if at the time there is no copyright in the opera itself, but otherwise not (b). It has also been held that a mechanical apparatus for producing musical sounds by the passage of air through perforations in a roll of cardboard, inasmuch as it is not an actual reproduction in tangible form of the notes on a sheet of music, does not constitute an infringement of copyright, although the effect may be a colourable reproduction of the original melody (c).

The Musical Copyright Act, 1902 (d), enables a Court of Summary Jurisdiction to order the seizure and (subsequently to the service of a summons upon the person from whom they were seized) (e) the destruction or delivery up to the copyright owner of pirated copies of musical works. Apparently such order for seizure *must* be issued although the pirated works are being sold in a private house, and the order does not confer on the constable the authority of a search warrant (f).

No copyright
where
publication
criminal or
fraudulent.

The law will not protect the right of an author in respect of a publication which is itself an offence against the public, as being of an indecent or immoral nature (g). If a man is indictable for selling a book he can have no cause of action against another for doing something which may interfere with such sale. *Ex turpi*

upon it: *Leslie v. Young & Sons*, (1894) A. C. 335; *Chilton v. Progress Printing, &c., Co.*, (1895) 2 Ch. 28; and see *Kelly's Directories v. Garin*, (1902) 1 Ch. 631, C. A.

(a) See below, pp. 682-4.

(b) *Per Kelly, C. B., Wood v. Boosey*, (1868) L. R. 3 Q. B. p. 230. See *D'Almaine v. Boosey*, (1835) 1 Y. & C. (Ex.) 288.

(c) *Boosey v. Whight*, (1900) 1 Ch.

122, C. A.; and see S. C. as to rule relating to pirated "expression marks."

(d) 2 Edw. VII. c. 15.

(e) *Francis, Ex parte*, (1903) 1 K. B. 275.

(f) *Ibid.*, 88 L. T. 806.

(g) *Stockdale v. Oncklyn*, (1826) 5 B. & C. 173; and see *Baschet v. London Illustrated Standard Co.*, (1900) 1 Ch. 73.

causâ non oritur actio. This maxim has been applied also where the author is guilty of a fraud upon the public, and seeks to acquire a circulation by passing his work off under false colours (*a*).

Copyright is defined by 5 & 6 Vict. c. 45, s. 2, as "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." By s. 15 it is provided that "if any person shall, in any part of the British dominions, . . . print or cause to be printed, either for sale or exportation, any book in which there shall be a subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea (*b*), or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright" (*c*). It is to be observed that the remedy here given is not co-extensive with the right. Copies may be made otherwise than by printing and for other purposes than sale or hire. If so, the sole right of multiplying copies is infringed, and according to the general principles of the law, apart from the statute, an action lies for the infringement (*d*).

What is
copyright.

Action by
statute.

Action by
common law.

The period of limitation in all actions for breach of copyright is twelve months (*e*). The Public Authorities Protection Act, 1893, repeals s. 26 of the Copyright Act, 1842, in so far as it applies to persons acting in the execution of statutory or other public duties. Consequently in such cases the period of limitation is now six months.

Limitation.

It is not piracy to recite or give public readings from a work

Reciting or
acting not
piracy, unless
copies made.

(*a*) *Wright v. Tallis*, (1845) 1 C. B. 893.

Blackwood, (1898) 1 Ch. 58.

(*b*) See *Cooper v. Whittingham*, (1880) 15 Ch. D. 501.

(*d*) *Norello v. Sudlow*, (1852) 12 C. B. 177; *Agar v. Peninsular, &c.*, (*ib.*, (1884) 26 Ch. D. 637; *Warne & Co. v. Seebohm*, (1888) 39 Ch. D. 73.

(*e*) The piratical copies also become the property of the owner of the copyright: s. 23; and see *Muddock v.*

(*e*) s. 26.

which is the subject of copyright, nor is it piracy to perform a dramatised version of such a work, for in none of these cases is there a multiplication of copies (a). But although the mere performance of a dramatised version of a novel, however extensive the plagiarism, is not a legal wrong to the author of the novel, yet if for the use of the performers and other purposes connected with the production of the play it is copied and distributed in manuscript, this is a multiplication of copies which infringes the right of the novelist (b). There is therefore an almost insuperable practical difficulty in the way of playwrights who desire to appropriate to their own benefit the invention of authors of fiction.

Plagiarism.

A writer is guilty of piracy when he transfers bodily into his own pages the whole or part of the work of another man, or when without actual transcription he makes an illegitimate use of the substance of such work.

Animus furandi.

It is sometimes said that the essential mark of piracy is the intention to steal (c), but such expressions must not be taken as laying down a general rule. A piracy is a piracy, just as a trespass is a trespass, apart from any question of the wrong-doer's intention (d). A man may pirate a work of the very existence of which he is unaware (e). But every writer is entitled to use previous literature within legitimate limits, and in considering whether these limits have been transgressed the object and intention of the writer are a fit subject of inquiry. This is particularly

Extracts.

so where it is complained that a work is pirated by the publication of extracts from it. It is clearly permissible for the purpose of legitimate criticism to publish specimens of a work, with a view to showing its scope and character. So, it is no impeachment of the originality of a work if a writer makes citations for the purpose of illustrating or enforcing the propositions of his text. But it is illegitimate to publish extracts in such a manner that

(a) *Reade v. Conquest*, (1861) 9 C. B. N. S. 755; *per* Page-Wood, V.-C., *Cary v. Kearsley*, (1803) 4 Esp. p. 170; *per* Page-Wood, V.-C., *Jarrold v. Houlston*, (1857) 3 K. & J. p. 716.
Tinsley v. Lacy, (1863) 1 H. & M. p. 751.

(b) *Warne v. Seebohm*, (1888) 39 Ch. D. 73. (d) *Lee v. Simpson*, (1847) 3 C. B. 871.

(e) *Reade v. Conquest*, (1861) 11 C. B. N. S. 479.
 (c) *Per* Lord Ellenborough, C.J.,

the publication may serve some readers instead of the original work, and therefore compete with it in the market (a).

Theories and speculations, however original they may be, are not the subject of copyright. When once propounded they are regarded as additions to the common stock of science or learning, and any one who pleases may restate them in his own way (b). But it is different with matters of pure literary invention. It is not lawful, for instance, to borrow wholesale the plot, incidents, and language of a novel, and use them as materials for a play which is afterwards printed and published (c).

Theories and speculations.

Literary invention.

The most difficult questions with regard to piracy arise where neither the work of the plaintiff nor the work of the defendant is in the strict sense original, but both profess to be based on materials which are common property. In such cases the plagiarism may be committed in two ways. The method and arrangement of the second book may be borrowed from the first, or the matter contained in the second may not be the result of independent knowledge, but merely a reproduction of the first. A writer may resort to a predecessor on the same subject, as a guide to the original authorities, but he has no right to give second-hand quotations and results—at any rate under the guise of an independent examination (d). In all cases, where substantial similarities between two works are found, the question is whether the coincidences are due to the one being derived from the other, or to their both being derived from a common source (e).

Fair use of common materials.

The same principle is applied in the case of such compilations as directories and the like, in which the sole element of originality is the labour. The compiler may use the publication of his predecessor in order to guide him to the sources of information, but he must not copy. He may take the names and addresses and give them to his canvassers that they may go and make independent

Directories.

(a) As to the limits of permissible use of extracts, see *Roworth v. Wilkes*, (1807) 1 Camp. 94; *Sweet v. Cater*, (1841) 11 Sim. 572; *Campbell v. Scott*, (1842) 11 Sim. 31; *Scott v. Stanford*, (1867) L. R. 3 Eq. 718; *Bradbury v. Hotten*, (1872) L. R. 8 Ex. 1.

(b) *Pike v. Nicholas*, (1869) L. R. 5

Ch. 251.

(c) *Tinsley v. Lacy*, (1863) 1 H. & M. 747.

(d) *Pike v. Nicholas*, (1869) L. R. 5 Ch. 251.

(e) *Jarrold v. Houlston*, (1857) 3 K. & J. 708; and cp. *Jarrold v. Heywood*, (1870) 18 W. R. 279.

inquiry, but he may not use the entries as a whole and simply get them verified (a).

Abridgments. It is laid down in the older authorities that a genuine abridgment—a reproduction in a condensed form of the sense of an original work and not a mere stringing together of extracts—is no piracy (b). It is difficult to see the consistency of this view with the general principles of the law on the point. It is said that a good abridgment may be a benefit to the public and, in a sense, an original book. It has, however, already been pointed out that a book, which may be original where the author uses materials which are common to all the world, may be a piracy if he use materials protected by copyright. In *Dickens v. Lee, Knight-Bruce*, V.C., says, "I am not aware that one man has a right to abridge the works of another" (c).

Amount of borrowing.

It is impossible to lay down any rule as to the extent of borrowing which is required to constitute a piracy. "When it comes to a question of quantity it must be very vague. One writer might take all the vital parts of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to" (d). A defendant may rely on the smallness of the use he has made of the plaintiff's book as showing he has done nothing unfair or improper at all, as, for instance, where he has not exceeded the limits of permissible quotations; but still, even it be held that the defendant has been guilty of plagiarism, the smallness of the theft will be a good reason for refusing an injunction, and will justify a verdict for the defendant. In order to constitute a piracy it should be shown that a material and substantial part of the plaintiff's work has been taken (e). Considerable controversy frequently exists between authors and publishers as to their respective rights in relation to the reproduction of original matter

Respective rights of author and publisher.

(a) *Morris v. Wright*, (1870) L. R. 5 Ch. 279; explaining *Kelly v. Morris*, (1866) L. R. 1 Eq. 697, and *Morris v. Ashbee*, (1868) L. R. 7 Eq. 34.

(b) *Lofft*, 775; *Bell v. Walker*, (1785) 1 Bro. C. C. 451; per Lord Hardwicke, *Gyles v. Wilcox*, (1740) 2 Atk. p. 143.

(c) (1844) 8 Jur. p. 184. See too per Page-Wood, V.-C., *Tinsley v. Lacy*,

(1863) 1 H. & M. p. 754.

(d) Per Lord Cottenham, *Bramwell v. Halcomb*, (1836) 3 My. & Cr. p. 733.

(e) *Pike v. Nicholas*, (1869) L. R. 5 Ch. 251; *Bradbury v. Hotten*, (1872) L. R. 8 Ex. 1; *Chatterton v. Carr*, (1875-8) L. R. 10 C. P. 572; 2 C. P. D. 42; 3 App. Cas. 483.

in a second edition or in a varied form. In the case of contributions to encyclopædias, statistical works, and other compilations of a similar character (apart from express contract) the copyright vests in the publisher and not in the author, whether the former has paid the latter, in compliance with a written agreement, a lump sum down, or a fixed rate per page or per thousand words. Consequently any subsequent reproduction by the author without the publisher's consent will apparently render him liable to an injunction and damages at the suit of the publisher (a). A rule the converse of this as regards damages, though apparently not as regards an injunction, applies in cases where there is a subsisting agreement, either by parol or in writing, between author and publisher, in relation to the editing of a classical work (b). Moreover an agreement between an author and a publisher to share profits is a purely personal one, and is not assignable. Consequently upon the bankruptcy of the publisher his rights do not pass to his trustee so as to entitle him to reprint and publish a new edition (c). Where an author successfully establishes his claim to an injunction, he is also entitled to demand the delivery up of any infringing copies still in the publisher's possession, and to an account of the actual proceeds of the copies sold (d).

The interest which the author of a musical or dramatic composition has in his work is of a twofold nature. There is, first, the right of multiplying copies—the literary copyright, and, secondly, the more important right of performance and representation. This latter right was first recognised by 3 and 4 Will. IV. c. 15.

Musical and
dramatic
works.

This Act provided that the authors (e) of dramatic pieces (f) and their assignees should have the sole liberty of representing, or causing to be represented, their works in any place of dramatic entertainment, in case of works not printed or published, for an indefinite period (g), in case of works printed and published, for

Stage-right.

(a) *Lawrence & Bullen v. Aflalo & Cook*, (1904) A. C. 17, H. L.

(b) *Gollancz v. Dent*, (1903) 88 L. T. 358.

(c) *Lucas v. Moncrieff*, (1905) 21 T. L. R. 683.

(d) *Muddock v. Blackwood*, (1898) 1 Ch. 58.

(e) As to what constitutes an author, see *Shepherd v. Conquest*, (1856) 17 C. B. 427; *Hatton v. Keen*, (1859) 7 C. B. N. S. 268; *Lery v. Rutley*, (1871) L. R. 6 C. P. 523.

(f) See *Lee v. Simpson*, (1847) 3 C. B. 871.

(g) This provision does not seem to

	<p>twenty-eight years from the date of such publication or the author's life, whichever period should be longest. The remedy given for the infringement of this right was that for each representation of the whole or part of the work in question the proprietor might recover, at his option, either a penalty of forty shillings, or the injury or loss sustained by him, or the full amount of the benefit or advantage gained by the defendant. The period of limitation for bringing such action is twelve months (a).</p>	
Limitation of action.		
Performing right in music.	<p>By 5 & 6 Vict. c. 45, s. 20, the period of stage-right in dramatic pieces is extended to the full term allowed for literary copyright, dating from their first public representation; and all the rights given in respect of such pieces are extended to all musical compositions.</p>	
Registration.	<p>It is further provided by the same section that the provisions of the Act with respect to registration shall apply to such compositions (b); but the effect of a subsequent section (c) is that registration is not a condition precedent to the bringing of an action under 3 & 4 Will. IV. c. 15.</p>	
Notice of reservation of performing right.	<p>By 45 & 46 Vict. c. 40, provisions are made for printing on the title-page of every published copy of musical compositions, the right of publicly (d) representing or performing which it is desired to retain, a notice to the effect that the right of public representation or performance is reserved. The Act, however, does not define what effect non-compliance with these provisions has upon the right of action for infringement.</p>	
Damages for infringement of right.	<p>By 51 & 52 Vict. c. 17, s. 1, it is provided that, in actions for the unauthorised representation or performance of any musical composition, only such damages shall be given as the tribunal thinks reasonable. The option of the plaintiff to sue for the forty shillings penalty is taken away.</p>	
Double right in dramatic and musical works.	<p>The effect of 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45, is to add to the author's right already existing at common law. See above, p. 673.</p>	
	(a) s. 3.	<i>Armstrong</i> , (1905) 21 T. L. R. 189.
	(b) As to the effect of an incorrect entry, in the register at Stationers' Hall, with regard to the place and date of the first representation, see <i>Hardacre v.</i>	(c) s. 24; <i>Russell v. Smith</i> , (1848) 12 Q. B. 217.
		(d) It is to be observed that there is nothing either in 3 & 4 Will. IV. c. 15, or 5 & 6 Vict. c. 45, about the publicity of the performance; see below, pp. 687 <i>seq.</i>

create a double right, one of multiplying copies, one of representation, which being perfectly distinct, may begin and end at different times, and by assignment may become vested in different persons (a). If the author of a dramatic piece or musical composition publishes it as a book before he represents it, he does not thereby deprive himself of the power of subsequently acquiring a stage-right by giving a public representation (b).

The statute 5 & 6 Vict. c. 45 does not say where the first publication is to take place, but by 7 & 8 Vict. c. 12, s. 19, it is provided (*inter alia*) that no exclusive right of representation shall be given except under the provisions of that Act, where the first publication has taken place out of her Majesty's dominions. Publication in this section appears to mean that kind of publication which affects the particular right in question. Therefore, a first representation in a foreign country will prevent an author acquiring a stage-right in this country except under the terms of 7 & 8 Vict. c. 12(c), while a printing and publishing, it is apprehended, will not.

Effect of first representation abroad.

The stage-right in dramatic pieces is confined to representations and performances in places of dramatic entertainment, but the corresponding right given by 5 & 6 Vict. c. 45, s. 20, in respect of musical compositions is not subject to any such limitation (d). It has therefore been said that a larger protection is given to musical than to dramatic works (e). Whether for practical purposes this is so is a question not altogether easy to determine. In *Wall v. Taylor* (f) the defendant had sung a song, in which the plaintiff had the performing right, at a public

Infringement of stage-right and musical right.

(a) 5 & 6 Vict. c. 45, s. 22. See *per* North, J., *Chappell v. Boosey*, (1882) 21 Ch. D. p. 239.

(b) *Chappell v. Boosey*, (1882) 21 Ch. D. 232. If an author publishes his dramatic or musical work as a book and, before he puts it upon the stage, some one else publicly represents it, there is, it is apprehended, nothing in the statutes to make such representation wrongful, since the provision in Lytton Bulwer's Act, dating the copyright from the printing and publishing, is impliedly repealed by Talfourd's Act, dating it from the first public representation. Such representation by a stranger would

not serve to give the stage-right to the author (*Clementi v. Walker*, (1824) 2 B. & C. 861), but apparently it would not prevent him acquiring the right by a subsequent representation, unless by his acquiescence he made the piece *publici juris*.

(c) *Boucicault v. Chatterton*, (1877) 5 Ch. D. 267.

(d) *Wall v. Taylor*, (1882) 9 Q. B. D. 727; 11 Q. B. D. 102.

(e) *Per* Shadwell, V.-C., *Russell v. Smith*, (1846) 15 Sim. p. 182.

(f) (1882) 9 Q. B. D. 727; 11 Q. B. D. 102.

Degree of publicity.

concert in a public hall. It was contended that he was not liable, because the hall was not a place of dramatic entertainment, but this contention was overruled. The performance was clearly public, but some of the *dicta* in the case seem to point to the conclusion that under certain circumstances a purely private performance may be an infringement of the right (a).

In *Duck v. Bates* (b) the defendant had taken an active part in an amateur performance of a play, the stage-right in which belonged to the plaintiff. The performance took place in a room at a hospital, and the audience consisted of the staff, some friends of the performers, and a theatrical reporter. No charge was made for admission. It was held that the plaintiff had no cause of action. All the judges in the Court of Appeal seem to have considered that there was a "performance" within the meaning of the Act; but the majority (c) held that there was no performance in a place of dramatic entertainment, the proceedings having been substantially private. "In order to incur the penalties of the Act the place of dramatic entertainment must be some spot for the occasion appropriated to the dramatic entertainment of a portion of the public; and then the question of fact will arise whether the place has not been so appropriated on any particular occasion: profit is a very important element: the question of numbers is also very important: these are matters to be taken into consideration" (d).

The conclusion then would seem to be that when the statute speaks of a performance it means any performance, but that when it speaks of a place of dramatic entertainment it means a place of public dramatic entertainment. It is difficult to see why this should be so. The reason given for holding that the "place" must be more or less public is that the possessor of the stage-right is not injured if his play is acted in a purely private and domestic manner (e). Equally it may be said that the possessor of a musical copyright is not injured unless his piece is sung with some degree of publicity. On the whole.

(a) See *per* Brett, M.R., *ibid.*, pp. 106-7. (Fry, L.J., diss.).

(b) (1883-4) 12 Q. B. D. 79; 13 Q. B. D. 843.

(c) Brett, M.R., and Bowen, L.J.,

(d) *Per* Bowen, L.J., *ibid.* p. at p. 851.
(e) See *per* Brett, M.R., *Duck v. Bates* (1884) 13 Q. B. D. at p. 847.

therefore, in spite of the difficulty caused by the words "place of dramatic entertainment," it may be doubted whether there is any difference between musical and dramatic rights in respect of the degree of publicity requisite to constitute an infringement(a).

Cases where the plaintiff complains of an unfair taking of parts of his composition are dealt with on the principles already pointed out with regard to literary plagiarism(b). In 3 & 4 Will. IV. c. 15, s. 2, a right of action is given against those representing a protected production "or any part thereof." These words, however, must receive a reasonable construction, and where the borrowing is of an insignificant character it ought not to be treated as an infringement of the plaintiff's right. There should be a taking of a material and substantial part; and it is a question of fact in each case what is material and substantial(c).

Amount of plagiarism.

As has been seen(d), it is no infringement of literary copyright to represent a dramatised version of a published novel on the stage. If a stage-right is acquired in one such version another adaptor may lawfully produce a rival version, provided he takes his materials straight from the novel and does not in any way avail himself of the other play. It makes no difference if the first adaptation is the work of the author of the novel(e). If, however, an author constructs both a play and a novel out of the same materials, and acquires a stage-right in the one before he publishes the other, no one has a right to use such materials for stage purposes, though he may have taken them from the novel, and in fact be ignorant of the play altogether(f).

Rival dramatic versions of novels.

If a man lets his premises for a musical or dramatic performance, and a piece is represented which infringes a stage-right, he cannot be said to "cause it to be represented," so as to

Causing to be represented.

(a) As to private musical performances, see *per* Stephen, J., *Duck v. Bates*, (1883) 12 Q. B. D. p. 86; 45 & 46 Vict. c. 40, seems to assume that such performances do not infringe any right.

(b) See above, p. 682.

(c) *Chatterton v. Cave*, (1875-8) L. R. 10 C. P. 572; 2 C. P. D. 42; 3 App. Cas. 483; *Planché v. Braham*, (1837) 4 Bing. N. C. 17.

(d) See above, p. 682.

(e) *Reade v. Conquest*, (1861) 9 C. B. N. S. 755; *Toole v. Young*, (1874) L. R. 9 Q. B. 523; *Schlesinger v. Bedford*, (1890) 63 L. T. N. S. 762.

(f) *Reade v. Conquest*, (1861) 11 C. B. N. S. 479; *Schlesinger v. Turner*, (1890) 63 L. T. N. S. 764. See *Boosey v. Fairlie*, (1877) 7 Ch. D. 301.

make him liable to an action, even though he may have had notice of what it was intended to perform. He is not in any fair sense a party to the representation (*a*). But where the defendant, the proprietor of a theatre, let it to a member of his company for the night, together with the use of all the properties and the services of all the staff and company, he was held responsible for an unauthorised representation which took place (*b*).

By 51 & 52 Vict. c. 17, s. 8, it is provided that the proprietors, tenants, and occupiers of places at which unauthorised performances of musical compositions take place shall not incur any liability in consequence, unless they wilfully cause or permit such performances knowing them to be unauthorised.

Copyright in
prints.

By 8 Geo. II. c. 13 (amended by 7 Geo. III. c. 38, and 15 & 16 Vict. c. 12, s. 14) the sole right (*c*) and liberty of printing and reprinting is given to those who invent, or design, or execute, and to those who from their own invention and design procure to be executed (*d*), original prints, and also to those who execute or cause to be executed prints from pictures, drawings, models, and sculptures, ancient and modern. An action for a five shillings penalty is given for the invasion of this right, which action must be brought within three months after the discovery of the offence (*e*). However, a subsequent statute (*f*) especially provides a right of action for the making, printing, and importing for sale, publishing, selling, and otherwise disposing of piratical (*g*) copies of protected works (*h*). There is no special term of limitation mentioned in this Act. The copyright is given for twenty-eight years commencing from the first day of publication (*i*), which day

(*a*) *Russell v. Briant*, (1849) 8 C. B. 836.

(*b*) *Marsh v. Conquest*, (1864) 17 C. B. N. S. 418; cp. *Lyon v. Knowles*, (1863-4) 3 B. & S. 556; 5 B. & S. 751. The question, of course, must frequently be one of fact for the jury.

(*c*) This right is assignable: *Thompson v. Symonds*, (1792) 5 T. R. 41.

(*d*) See *Stannard v. Harrison*, (1871) 24 L. T. N. S. 570.

(*e*) 8 Geo. II. c. 13, s. 4.

(*f*) 17 Geo. III. c. 17. This only deals with engravings made in Great Britain. A similar protection to those made in Ireland is given by 6 & 7

Will. IV. c. 59. The original acts do not deal with locality of production.

(*g*) It is not a piracy under this Act to take or deal with copies from the original plate, however wrongful such conduct may be. The plate itself must be piratical: *Murray v. Heath*, (1831) 1 B. & Ad. 804.

(*h*) Ignorance of the piracy is no defence; see *Gambert v. Sumner*, (1860) 5 H. & N. 5.

(*i*) 7 Geo. III. c. 38, s. 6. Such publication must take place in the King's dominions; 7 & 8 Vict. c. 12, s. 19; 8 Geo. II. c. 13, s. 1.

is "to be truly engraved with the name of the proprietor of each plate," and printed on every impression. These last words are imperative, and no action lies for the piratical copying of any plate in respect of which they have not been obeyed (*a*). The Fine Arts Copyright Act, 1862 (*b*), further amends existing legislation, and confers additional protection on the owners of copyright in works of art.

Whether one print can fairly be said to be a copy of another is clearly a pure question of fact (*c*). It is a proper direction to the jury to ask them whether the main design of the plaintiff's engraving has been copied, and whether the defendant's engraving is substantially a copy of the plaintiff's (*d*). It matters not what the precise method of reproduction adopted may be (*e*). It is a piracy to photograph an engraving, though photography was not known at the time of the enactment of 8 Geo. II. c. 13 (*f*).

Infringement.

If the design of an engraving is not original, all that is protected is the engraver's skill. Other people have as good a right as he to the use of the invention displayed in the painting or drawing from which he copied. In *Dicks v. Brooks* (*g*), the defendant counter-claimed against the plaintiff in respect of a woolwork pattern of the figures in a celebrated picture published by the latter, which was taken apparently not from the original but from the defendant's engraving. It was held that this pattern was not a copy of anything in which the skill or work of the engraver was shown, and therefore not any infringement of the engraver's right.

Where design of print not original.

By 54 Geo. III. c. 56, persons who "shall make or cause to be made" new and original sculpture, models, copies, casts, busts, and works in relief, "shall have the sole right and property" in them for fourteen years "from the first putting forth and

Copyright in sculpture.

(*a*) *Thompson v. Symonds*, (1792) 5 T. R. 41; *Newton v. Cowie*, (1827) 4 Bing. 234; *Brooks v. Cock*, (1835) 3 A. & E. 138; *Graves v. Ashford*, (1867) L. R. 2 C. P. 410; *Rock v. Lazarus*, (1872) L. R. 15 Eq. 104. As to what is a sufficient engraving of the name, see these cases.

(*b*) 25 & 26 Vict. c. 68; and see *infra*.

(*c*) See on this point; *Hanfstaengl v.*

W. H. Smith & Sons, (1905) 1 Ch. 519.

(*d*) *Moore v. Clarke*, (1842) 9 M. & W. 692. See too *West v. Francis*, (1822) 5 B. & Ald. 737.

(*e*) See, however, *Martin v. Wright*, (1833) 6 Sim. 297.

(*f*) *Gambart v. Ball*, (1863) 14 C. B. N. S. 306; *Graves v. Ashford*, (1867) L. R. 2 C. P. 410.

(*g*) (1880) 15 Ch. D. 22. See too *Lucas v. Cooke*, (1880) 13 Ch. D. 872.

publishing of the same" (a), and for a further term of fourteen years if they so long live (b). It is a condition of the right that the date and name of the proprietor is to appear on each work before publication (c).

Infringement. The making, importing, exposing for sale, or otherwise disposing of pirated copies of works within the protection of this Act affords a cause of action for such damages as a jury shall assess (d). It has been held that metal models of cavalry soldiers sold as toys for children, if the anatomy be good, and the modelling show both technical knowledge and artistic skill, are within the protection afforded by this statute (e). The action must be brought within six months of the discovery of the wrongful act (f).

Copyright in works of art.

By 25 & 26 Vict. c. 68, the sole and exclusive right (g) of copying, engraving, reproducing, and multiplying their works is given to the authors (h) of original paintings, drawings, and photographs (i) wherever made, if they are subjects of the King or resident within his dominions.

In order, apparently, to entitle the owner of the copyright to at least nominal, damages and, in case of necessity, to an injunction restraining reproduction it is not essential that the pirated copy should be in all respects a *fac simile* of the original work (k). It is enough if the copy "comes so near the original as to give every person seeing it the idea created by the original" (l).

The right is personal property and assignable. It endures for the author's life (m) and seven years afterwards (n). It is exceptional among rights of this description in that it does not

(a) As to what amounts to a publishing, see *Turner v. Robinson*, (1860) 10 Ir. Ch. Rep. 121 and 510. As to publishing outside the Queen's dominions, see 7 & 8 Vict. c. 12, s. 19.

(b) s. 6. As for assignment, see ss. 4, 6.

(c) s. 1.

(d) s. 3.

(e) *Britain v. Hanks*, (1902) 86 L. T. 765.

(f) s. 5.

(g) There may be an implied contract, as between artist and his sitter, that this right shall not be exercised: *Pollard v. Photographic Co.*, (1888) 40 Ch. D. 345.

(h) A person who merely conceives a

design which he procures another person to draw for him is not the author of the drawing: *Kenrick v. Laurence*, (1890) 25 Q. B. D. 99.

(i) A photograph of a picture may be "original": *Graves's case*, (1869) L. R. 4 Q. B. 715.

(k) *Hanfstaengl v. W. H. Smith & Sons*, (1905) 1 Ch. 519.

(l) *West v. Francis*, (1822) 24 B. R. 541; 1 D. & R. 400.

(m) s. 3. There may be an assignment of a right to take copies of a certain kind only: *Lucas v. Cooke*, (1880) 13 Ch. D. 872. As to the effect of a sale of the work itself on the right, see s. 1.

(n) s. 1.

depend upon publication (a), but exists apparently from the production of the work. However, no remedy is given under the Act for any infringement of the right until registration, with all the particulars (b) required by the Act, has been duly made (c).

At one time the law was indeterminate as to the exact reciprocal rights of photographer and customer in a portrait produced by the former in return for payment by the latter. It has, however, been decided in the modern case of *Boucas v. Cooke* (d) that the copyright in a photograph vests in the customer (although, apart from special contract, the negative belongs to the photographer), the work being "made or executed for or on behalf of" another "person for a good or valuable consideration" within the meaning of s. 1 of the Fine Arts Copyright Act, 1862. The effect of this decision is to preclude the photographer from printing, exposing to view, or selling any portrait against the wish of the customer (e).

Any one who without the consent of the proprietors of the copyright, either by himself or through the agency of others, repeats, copies, colourably imitates, or otherwise multiplies for sale, hire, exhibition or distribution, protected works, or imports, sells, publishes, lets, exhibits, or distributes, or offers for sale, hire, exhibition or distribution, repetitions, copies or imitations of such works or their designs, is liable to an action for damages, and also for the recovery of the piratical copies (f). It has been held under s. 6 of this statute that the printing, issuing, and circulation of each unauthorised copy constitutes a separate offence (g).

A copy of a copy may be an infringement of the copyright in the original, as, for instance, where a photograph is taken of an engraving of a picture (h).

(a) But if there is publication abroad 7 & 8 Vict. c. 12, s. 19, applies; see s. 12.

(b) See *Ex parte Beal*, (1868) L. R. 3 Q. B. 387. It is sufficient if an assignment be registered though the original copyright be not: *Graves's case*, (1869) L. R. 4 Q. B. 715.

(c) s. 4. See *Tuck & Son v. Priestler*, (1887) 19 Q. B. D. 629.

(d) (1903) 2 K. B. 227, C. A.

(e) And see *McCush v. Crow*, (1903) 5 F. 670, Ct. of Sess.; as to who is the "author" of a photograph, see *Nottage*

v. Jackson, (1883) 11 Q. B. D. 627.

(f) s. 11. This is in addition to proceedings for penalties under ss. 7, 8. The penalties are mainly directed against breaches of the Act fraudulently or knowingly committed.

(g) *Hildesheimer v. Faulkner*, (1901) 2 Ch. 552.

(h) *Ex parte Beal*, (1868) L. R. 3 Q. B. 387; *Hanfstaeigl v. Empire Palace*, (1894) 3 Ch. p. 127; *Hanfstaeigl v. Baines & Co.*, (1895) A. C. p. 24.

It is expressly provided that nothing in the Act shall prejudice the right to copy or use any work in which there shall be no copyright, or to represent any scene or object notwithstanding that there may be copyright in some representation of such scene or object (*a*). This enactment is in accordance with the general principle of copyright law that there can be no appropriation of materials and subjects common to all the world. It would, it is apprehended, be a piracy for a photographer to arrange a group after a picture, and then to touch up and colour his photograph so as to resemble the picture (*b*). But the representation of a picture by means of a *tableau vivant* is not an infringement of the copyright in the picture (*c*).

Foreign
copyright.

By 7 & 8 Vict. c. 12, her Majesty in council was empowered to make orders that authors of books, sculpture, prints, and works of art, first published in a foreign country named in the order (*d*), may have copyright in them for periods defined in the order, not exceeding the terms for which they would have had copyright in them if they had been first published in this country (*e*); she is also empowered to make similar orders as to the right of performance of musical and dramatic compositions (*f*). By s. 19 no author of any work first published abroad is to have any copyright or right of representation or performance except in so far as he may be entitled under this Act.

By 49 & 50 Vict. c. 33, s. 4, when an order respecting a foreign country is made under the International Copyright Acts the provisions of those Acts with respect to the registry and delivery of copies of works shall not apply to the works produced in such country except so far as is provided by the order (*g*); and by s. 6 an author or publisher of a work produced before the date of the order is entitled to the same rights and remedies as he would

(*a*) s. 2.

(*b*) See *Turner v. Robinson*, (1860) 10 Ir. Ch. Rep. 121. This case was decided upon the general law before the Act. See also *Lucas v. Cook*, (1880) 13 Ch. D. 872.

(*c*) *Hanfstaengl v. Empire Palace*, (1894) 2 Ch. 1.

(*d*) The order must state that such country gives reciprocal protection: s. 14.

(*e*) s. 2. Such an order shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced: 49 & 50 Vict. c. 33, s. 3.

(*f*) s. 5.

(*g*) Where the order contains no provisions as to the registry no registration is required: *Hanfstaengl v. American Tobacco Co.* (1895) 1 Q. B. 347.

have had if it had existed at the time of the production, provided that nothing in the section is to diminish or prejudice any rights or interest arising from or in connection with the production which are subsisting and valuable at the date of the order (a).

The general scope of the International Copyright Acts, 1844—1886, is to give in respect of works first published abroad protection in this country, subject to limitations and conditions similar to those which attach to the acquisition of the various kinds of copyright or stage-right in the case of works first published in this country (b). Thus, the proprietor of a foreign print, if he wishes to obtain copyright in this country, must comply with 8 Geo. II. c. 13, and engrave and print the date of publication and the name of the proprietor (c).

It was expressly provided by 7 & 8 Vict. c. 12, s. 18, that nothing in that statute should operate to prevent the production of translations of books protected under it. But with regard to works published in France this exception was modified by 15 & 16 Vict. c. 12, and with regard to works first produced in a country to which an order in council under the International Copyright Acts applies by 49 & 50 Vict. c. 33, s. 5.

By 46 & 47 Vict. c. 57, s. 47, the proprietors (d) of new and original (e) designs (f) for manufacturing purposes not previously published (g) in the United Kingdom may register them under the provision of the Act and thereby acquire a copyright in the design for five years from registration (h), that is to say, an exclusive right to apply it to the article for which it is registered (i). The proprietor must take due care to mark the design on every article in respect of which it is registered, before delivery on sale,

(a) As to what constitutes a subsisting and valuable interest, see *Moul v. Groenings*, (1891) 2 Q. B. 443; *Schauer v. J. C. & J. Field, Ltd.*, (1893) 1 Ch. 35.

(b) See ss. 4, 5, 6.

(c) *Aranzo v. Mudie*, (1854) 10 Ex. 203; see too *Cassell v. Stiff*, (1856) 2 K. & J. 279.

(d) Defined by s. 61.

(e) As to originality, see *Le May v. Welch*, (1884) 28 Ch. D. 24; *Saunders*

v. Wiel, (1893) 1 Q. B. 470.

(f) Defined by s. 60.

(g) There is an exception as regards exhibition: s. 57.

(h) s. 50.

(i) s. 60. A design already on the register may be registered in another class for an article used for another purpose, but not for an article used for the same purpose but made of a different material; *In re Bach's Design*, (1889) 42 Ch. D. 661.

or he loses his right (a). If the design is used abroad and not used in this country within six months of registration, in this case also the copyright ceases (b).

Infringement. The registered proprietor of a design may "bring an action for any damages arising from the application of his design or of any fraudulent or obvious imitation thereof for the purposes of sale to any article of manufacture or substance, or from the publication, sale, or exposure for sale, by any person of any article or substance to which any such design, or any fraudulent or obvious imitation (c) thereof, shall have been so applied, such person knowing that the proprietor thereof had not given consent to such application" (d).

Registration only affords *prima facie* evidence in favour of a party suing (e).

It has been held (f) that there is nothing inconsistent between a grant of a patent and the existence of a coincident statutory right to a design.

PART II.—PATENTS.

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What is a patent.

A patent consists in a grant from the Crown of the exclusive right of exercising and selling the products of an invention. The right of the Crown to grant such a privilege to an individual for a limited time, in consideration of the benefit that would accrue

(a) s. 51. See *Wittman v. Oppenheim*, (1884) 27 Ch. D. 260.

(b) s. 54.

(c) "The eye alone is the judge of the identity of the two things": *per* Lord Westbury, *Holdsworth v. M'Creagh*, (1867) L. R. 2 H. L. p. 388, and the Court ought not to take into consideration the question whether they accomplished the same useful object: *Hecla Foundry Co. v. Walker, Hunter & Co.*, (1889) 14 A. C. 550.

(d) s. 59. There is also a proceeding for penalties under s. 58. Under both

sections the right of action is in the registered proprietor alone: *Woolley v. Broad*, (1892) 1 Q. B. 806; and there is no right of action for the acts mentioned in the section but that which is given by the statute (*ibid.*).

(e) s. 55. See also Patents, Designs, and Trade Marks Act, 1883, c. 57, and *Heath v. Rollason*, (1898) A. C. 499.

(f) *Werner Motors, Ltd. v. A. W. Gamage, Ltd.*, (1904) 1 Ch. 264, Byrnes, J., at p. 269, approved by Vaughan Williams, L.J., S. C. (1904) 2 Ch. 300, pp. 586 *seq.*

to the public by the general user of such invention after the expiry of such time, existed at the common law. In a case decided in the reign of Queen Elizabeth it was laid down that "when any man by his own charge or industry, or his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm, that in such cases the King may grant to him a monopoly patent for some reasonable time until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth; otherwise not" (a). And the sixth section of the Statute of Monopolies (b), except in so far as it defines what is to be deemed a reasonable time, is merely declaratory of the common law. By that section it is provided that the general prohibition against monopolies contained in the earlier part of the statute "shall not extend to any letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent shall not use. So also that they be not contrary to the law or mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient" (c).

The subject-matter of a patent can only be some "new manufacture within this realm." The term "manufacture" in the statute includes two things, the manufactured product, and the mode of producing it. It includes the former for this reason, that "if the inventor could sell his invention keeping the secret to himself, and when it was likely to be discovered by another take out a patent, he might have practically a monopoly for a much longer period than fourteen years" (d).

Subject-matter of patent.
Manufactured product.

"The word 'manufacture' not only comprehends productions, but it also comprehends the means of producing them. Therefore,

Method of production.

(a) *Darcy v. Allin*, (Jac. I.) Noy, p. 182.

(b) 21 Jac. I. c. 3.

(c) With the exception of this section, the chief enactments which now regulate the granting of patents are the Patents,

Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), and the amending Act (51 & 52 Vict. c. 50).

(d) *Per* Parke, B., *Morgan v. Seaward*, (1837) 2 M. & W. p. 559.

Sale of
constituent
part of
patented
article.

Unworkable
patents.

in addition to the thing produced, it will comprehend a new machine or a new combination of machinery, it will comprehend a new process or an improvement in an old process" (a). A combination of previously known processes may be the subject of a valid patent provided the combination is new and useful (b); and this is so even though the combination includes the subject of an existing patent (c). The new patentee may not, of course, exercise his right in infringement of the old or pioneer patent (d). He must obtain a licence to use it or must purchase the patented article to use in his own combination. But the mere application of old means to a new end does not constitute a new invention (e), and the converse of this proposition also applies (f). Nor is the sale of a constituent part of a patented article in itself an actionable infringement of a patent, even though the vendor at the time of the sale may be well aware that it was bought for the express purpose of being so used with other constituents as combinedly to form an infringement (g). No patent will be granted for a process which upon trial is proved to be unworkable. Where, however, an alternative and practicable method of working is also specified, the Court will upon terms, in spite of the technical rule that a patent, if bad in part, is bad altogether (h), allow a disclaimer of the unworkable process, and upon revocation thereof will grant a patent in respect of the practicable method. But no injunction will be granted for infringement by manufacture prior to the grant of the valid patent, unless the patentee can "establish to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge" (i).

(a) *Per* Lord Westbury, *Ralston v. Smith*, (1865) 11 H. L. C. p. 246.

(b) *Cannington v. Nuttall*, (1871) L. R. 5 H. L. 205. A very small quantum of utility is sufficient to support a patent; *Welsbach Incandescent Gas Light Co. v. Sunlight Patent Gas Light Co.*, (1900) 1 Ch. 843.

(c) *Crane v. Price*, (1842) 4 M. & G. 580.

(d) *Brown v. John Hastie & Co., Ltd.*, (1904) 7 F. 97, Ct. of Sess.

(e) *Harwood v. Great Northern R. Co.*, (1864-5) 11 H. L. C. 654.

(f) *Consolidated Car Heating Co. v. Came*, (1903) A. C. 539, P. C.

(g) *The Dunlop Pneumatic Tyre Co., Ltd. v. David Moseley & Sons, Ltd.* (1904) 20 T. L. R. 314, C. A.

(h) *Peck v. Hindes*, (1898) 67 L. J. Q. B. 272, at p. 273.

(i) *Geipel's Patents, In re*, (1903) 2 Ch. 715. For leave to amend specifications, see S. C. (1904) 1 Ch. 239. C. A. For the meaning of word "disclaimer" in s. 19 of the Patents, Designs and Trade Marks Act, 1883, see *Owen's Patent, In re*, (1898) 79 L. T. 453.

The manufacture must be new. "If the public once becomes Novelty. possessed of an invention by any means whatever, no subsequent patent for it can be granted either to the true or first inventor himself, or any other person, for the public cannot be deprived of the right to use the invention, and a patentee of the invention could not give any consideration to the public for the grant, the public already possessing everything that he could give" (a). Want of novelty may arise in either of two ways. First by the Previous use. use of the manufactured product by members of the public, which use will prevent the manufacture from being new, even though the parties using the product do not know how it is produced (b). The user by the public need not be general, probably user by a single individual will suffice (c), but it must be in public (as distinguished from use in a secret manner), as, for instance, where a lock for which a patent is claimed has been previously used upon a gate adjoining a high-road (d). Secondly, want of novelty Previous disclosure. may arise from the mode of producing the thing being known, or being so published as to be capable of being known to members of the public, even though the product has never been used. "It is not necessary that the invention should be used by the public as well as known to the public. If the invention and the mode in which it can be used has been made known to the public by a description in a work which has been publicly circulated (e), or in a specification duly enrolled (f), it avoids the patent, though it is not shown that it ever was actually put in use" (g). What will amount to publication of a description of an invention is a question of fact depending on the circumstances of each case. The fact of one copy of a book giving a description of an invention, and one copy of another book giving a drawing of it, both published in America, being sent to the library of the Patent Office in London,

(a) *Per* Lord Blackburn, *Patterson v. Gas Light & Coke Co.*, (1877) 3 App. Cas. p. 244; and see *Acetylene Illuminating Co. v. United Alkali Co.*, (1902) 1 Ch. 494; S. C. 72 L. J. Ch. 214, C. A.; *Haggenmacher's Patents, In re*, (1898) 2 Ch. 280.

(b) *Morgan v. Seaward*, (1837) 2 M. & W. 544.

(c) *Carpenter v. Smith*, (1842) 9 M. &

W. 300.

(d) *Ibid.*

(e) *Stead v. Williams*, (1844) 7 M. & G. 818.

(f) *Bush v. Fox*, (1856) 5 H. L. C. 707; *Betts v. Menzies*, (1861) 10 H. L. C. 117.

(g) *Per* Lord Blackburn, *Patterson v. Gas Light & Coke Co.*, (1877) 3 App. Cas. p. 244.

where, owing to want of space, they were put away in a room not readily accessible, was in one case held not sufficient publication (a). So, too, the fact of a single copy of a foreign treatise having been placed in the library of the British Museum, the books in which are catalogued according to their authors' names and not according to their subject-matter, has been held insufficient publication of the matter contained in the treatise (b). The conclusion derivable from the authorities has been thus expressed: "*Primâ facie* a patentee is not the first inventor of his patented invention if it be proved that before the date of his patent an intelligible description of his invention, either in English or in any other language commonly known in this country, was known to exist in this country, either in the Patent Office or in any other library to which the public are admitted, and to which persons in search of information on the subject to which the patent relates would naturally go for information. But if . . . it be proved that the foreign publication, although in a public library, was not in fact known to be there, the unknown existence of the publication in this country is not fatal to the patent" (c). But even if a book containing a description of an invention be circulated in England to such an extent that the book may be said to be publicly known, still the invention will not be publicly known unless the description is sufficient to enable an ordinary workman of average intelligence and skill in the trade to make the thing from the description (d). A prior publication which does not contain as much information as would be required in the specification of the patent (e) will not avail to defeat a claim to novelty (f).

Disclosure to assistants and at exhibitions.

A disclosure to assistants or partners of an invention whilst it is being perfected, under an obligation to keep it secret till the

(a) *Plimpton v. Malcolmson*, (1876) 3 Ch. D. 531.

(b) *Otto v. Steel*, (1885) 31 Ch. D. 241; cp. *United Telephone Co. v. Harrison*, (1882) 21 Ch. D. 720; *Harris v. Rothwell*, (1887) 35 Ch. D. 416.

(c) *Per Cotton and Lindley, LJJ., Harris v. Rothwell*, (1887) 35 Ch. D. p. 431.

(d) *Neilson v. Betts*, (1870-1) L. R. 5 H. L. 1.

(e) See below, pp. 705 *sqq.*

(f) *Per Jessel, M.R., Plimpton v. Malcolmson*, (1876) 3 Ch. D. p. 368. though see *dicta* to the contrary in *Anglo-American Brush Electric Light Corporation v. King & Co.*, (1892) A. C. 367. For procedure when a member of the public opposes the grant of a patent on the ground that the invention to which it relates is already patented, see *Reg. v. Comptroller-General of Patents*, (1899) 1 Q. B. 909, C. A.

patent is taken out, is not of itself a disclosure to the public, for such persons could not make the invention known without a breach of duty (a). But if such persons in breach of their duty publish the invention, the inventor cannot obtain a patent for it, for, as pointed out above, if the public once becomes possessed of an invention by *any means whatever*, the consideration for the grant of the patent is gone. To this rule, however, there is one exception provided by statute, namely, where the publication is consequent upon an application for a patent made in fraud of the inventor, and during the period of provisional protection obtained thereon (b). If a patent has been fraudulently obtained by a party not entitled, on its revocation the true inventor may obtain a patent for the residue of the term (c). Where an application for a patent is made by the inventor the invention may be used and published between the date of such application and that of the sealing of the patent, without prejudice to the validity of the patent when granted (d). The exhibition of an invention at an industrial or international exhibition, certified as such by the Board of Trade, will not prejudice the inventor's right to a subsequent patent, provided that before exhibiting he gives notice to the Comptroller of Patents of his intention to exhibit, and applies for a patent within six months of the opening of the exhibition (e).

The manufacture for which a patent is sought needs to be new only "within the realm." The fact that previously to an application being made for a patent the invention has been used or a description of it published elsewhere than within the realm is no objection to a patent being granted for it. The term "realm" only includes those portions of his Majesty's dominions over which the monopoly granted by the patent extends, and therefore does not include any colony (f). The form of patent in use prior to 1883 extended to the United Kingdom, the Isle of Man, and the Channel Islands, but now a patent is only to extend to the two former (g), and therefore presumably the Channel Islands

Use or
disclosure
abroad.

(a) *Morgan v. Seaward*, (1837) 2 M. & W. 544.

(b) 46 & 47 Vict. c. 57, s. 35.

(c) s. 26.

(d) s. 14.

(e) s. 39.

(f) *Rolls v. Isaac*, (1882) 19 Ch. D. 268.

(g) s. 16. But whether the omission of the Channel Islands was not

are no longer to be treated as parcel of the realm within the meaning of the Statute of Monopolies.

The words in the statute, "which others at the time of making such letters patent and grants shall not use," are not to be interpreted literally; any prior use will suffice to avoid the patent; the use need not have continued down to the time of the grant (a). Indeed, the proviso seems superfluous, its effect being already provided for in the requirement that the manufacture shall be new.

Utility.

But, "in order to support a right to the exclusive enjoyment of any invention, it is necessary that the party who takes out the patent should show that the invention . . . is not only new, but that it is useful to the public" (b). If an invention be altogether useless, a patent for it will be void as being against the words of the statute, which require that it shall not be "mischievous to the State" (c); but a very small amount of utility will suffice (d).

Who may be a patentee.

A patent may be granted either to a foreign or a British subject (e). It may be granted to more than one person, but one of the grantees must be the true and first inventor (f), or the legal representative of such inventor, and in this last case the application must be made within six months of the inventor's death (g).

Where letters patent are granted to more than one person, the grantees are tenants in common, and their liability over to a third party in respect of a warranty of the validity of the patent is joint and several (h).

Rights of co-owners.

In cases where the ownership of a patent or *secret process* of manufacture vests, by assignment or otherwise, in more than one person, the co-owners are entitled, apart from special contract, to work the patent or secret process without being

accidental seems doubtful. See ss. 104, 117.

(a) *Househill Coal & Iron Co. v. Neilson*, (1843) 9 Cl. & F. 788.

(b) *Per Gibbs, C.J., Manton v. Manton*, (1815) Dav. P. C. p. 348.

(c) *Per Parke, B.*, (1837) *Morgan v. Seaward*, 2 M. & W. p. 562.

(d) *Per Jessel, M.R., Plimpton v.*

Malcolmson, (1876) 3 Ch. D. p. 382; *Welsbach Incandescent Light Co. v.*

Sunlight Co., (1900) 1 Ch. 843.

(e) 46 & 47 Vict. c. 57, s. 4.

(f) 21 Jac. I. c. 3, s. 6; 46 & 47 Vict. c. 57, s. 5.

(g) 46 & 47 Vict. c. 57, s. 34.

(h) *National Society for Distribution of Electricity v. Gibbs*, (1900) 2 Ch. 280.

liable to account to each other for the profits. Nor is this rule varied when one of the co-owners is mortgagee of another's share (a).

It has been held that an assignment of the provisional protection automatically acquired by the approved application for a patent does not constitute a legal assignment of the actual patent when granted, but merely confers upon the assignee an equitable right to have the patent transferred to him (b).

Assignment of provisional protection.

There are two cases in which a man is treated as the true and first inventor of a patent though he be not so in fact.

True and first inventor.

In the first place he may not have invented it at all, he may have imported it from abroad (c). "If the invention be new in England a patent may be granted though the thing was practised beyond the sea before; for the statute speaks of new manufactures within this realm; so that if they be new here it is within the statute, for the Act intended to encourage new ideas useful to the kingdom, and whether learned by travel or by study it is the same thing" (d). However, "the cases holding that a communication from abroad would enable a person to take out a patent were an extension of the law, and originated at a time when communication with foreign parts was so difficult that there was merit in obtaining an invention from abroad" (e); the rule they establish is an anomaly, not depending on any principle whatever (f).

Invention communicated from abroad.

If an invention is in fact new in this country, it seems that anybody who becomes possessed of the knowledge may take out a patent, though he be not the person to whom the communication was first made, and, therefore, not, strictly speaking, the importer. "There is no law which says that if a man from abroad communicates to A., who communicates with B., B. may not take out the patent" (g). A patent may be granted to a

(a) *Steers v. Rogers*, (1893) A. C. 232; *Heyl-Dia v. Edmunds*, (1900) 81 L. T. 579.

(b) *Bowden's Patents Syndicate, Ltd. v. Smith*, (1904) 2 Ch. D. 86.

(c) By s. 103, provision is made for granting protection to foreign patents in certain cases.

(d) *Per Cur., Edgeberry v. Stephens*, C.T.

(1696) 2 Salk. 447. See too *per Tindal, C.J., Beard v. Egerton*, (1846) 3 C. B. p. 128.

(e) *Per Jessel, M.R., Marsden v. Saville Street Co.*, (1878) 3 Ex. D. p. 204.

(f) *Ibid.* p. 205.

(g) *Per Jessel, M.R., Plimpton v. Malcolmson*, (1876) 3 Ch. D. p. 552.

foreign resident abroad for an invention communicated to him by another foreigner also resident abroad (*a*). But it is clear that no one can patent an invention made in this country by some one else, and subsequently communicated to the applicant; and before the statute of 1883 (*b*) it made no difference that such applicant was the personal representative of the testator (*c*).

Where a person seeks to obtain a patent on the ground of a communication from abroad, and not on the ground of his own invention, it is always necessary that in so doing he should not commit a breach of good faith. If a person abroad communicates an invention to a person in this country for the purpose of the latter taking out a patent as agent for him, and the agent takes out the patent in his own name as for his own invention, it will be altogether void (*d*).

Where a claim as inventor is based on the fact of communication from abroad, this must be stated in the application (*e*).

Of two
inventors
he who first
publishes is
first inventor.

The second case in which the law treats a person as the true and first inventor, though he is not so in fact, is where he did indeed invent the manufacture, but somebody else had previously invented the same thing though without patenting it (*f*). If two inventors apply for patents for the same invention, the Comptroller may (*g*) refuse to seal a patent on the application of the second applicant (*h*), the first applicant being the first inventor within the meaning of the statute.

Specification.

Every application for a patent must be accompanied by a specification, provisional or complete (*i*); if the former only is deposited with the application, then a complete specification must be deposited within nine months (*k*). The complete specification must "particularly describe and ascertain the nature of the invention and in what manner it is to be performed, and must be accompanied by drawings if required." It must further "end with a distinct statement of the invention claimed" (*l*).

(*a*) *Re Wirth's Patent*, (1879) 12 Ch. D. 303.

(*b*) s. 34. See above, p. 702.

(*c*) *Marsden v. Saville Street Co.*, (1878) 3 Ex. D. 203.

(*d*) *Milligan v. Marsh*, (1856) 2 Jur. N. S. 1083.

(*e*) Patent Rules, 1885, Form A. 1.

(*f*) *Per Jessel, M.R., Plimpton v. Malcolmson*, (1876) 3 Ch. D. p. 556.

(*g*) "May" here seems equivalent to "shall."

(*h*) s. 7.

(*i*) s. 5.

(*k*) s. 8.

(*l*) s. 5. This section is directory

The claim must be carefully limited to that for which protection can be given. If a patentee affects to assert a monopoly in matters which are *publici juris* as well as in those as to which he is really an inventor, he makes a bad claim, since he is placing unfair impediments in the way of the lawful exercise of manufacture and invention by other people (a). So, too, a specification is bad if something is claimed as an improvement which is in fact devoid of utility (b).

Limitation of claim.

Where the invention consists in an addition to, or a development of, something already before the public, the inventor must be careful to specify the precise nature of the improvement which he alleges is his invention (c), and to distinguish between what is new and what is old, disclaiming all special right in the latter (d). If the claim is simply for a combination, it sufficiently appears that there is no claim in respect of the component parts, and, therefore, it is unnecessary to distinguish old and new (e).

A specification must give such a full and complete account of the invention as will enable people of ordinary intelligence and conversant with the subject-matter to produce the patented article from the description.

Full disclosure required.

In the case of a mechanical invention, for example, the question is not whether a person entirely ignorant of mechanics on the one hand, or a skilled mechanical engineer on the other, but whether a fairly competent and intelligent workman, could construct the machine from the specification (f). A patentee must disclose the whole of his invention. He cannot take out a patent for part and keep back another part as a trade secret (g). He

only, and non-compliance with it does not invalidate a patent: *Vickers, Sons & Co. v. Siddell*, (1890) 15 A. C. 496.

(a) *Per* Gibbs, C.J., *Bovill v. Moore*, (1816) Dav. P. C. p. 404; *per* Lord Ellenborough, C.J., *Harmar v. Playne*, (1809) *ibid.* p. 318.

(b) *Morgan v. Seaward*, (1837) 2 M. & W. 544.

(c) *Jandus Arc Lamp & Electric Co., Ltd. v. Arc Lamps, Ltd.*, (1905) 21 T. L. R. 308.

(d) *Clark v. Adie*, (1877) 2 App. Cas.

315.

(e) *Per* Lord Cairns, *Harrison v. Anderston Foundry Co.*, (1876) 1 App. Cas. p. 578; *Proctor v. Bennis*, (1887) 36 Ch. D. 740.

(f) *Per* Alderson, B., *Morgan v. Seaward*, (1837) 1 Webst. P. C. p. 174; *per* Jessel, M.R., *Plimpton v. Malcolmson*, (1876) 3 Ch. D. pp. 569-70; see too *Wegman v. Corcoran*, (1878-9) 13 Ch. D. 65.

(g) *Wood v. Zimmer*, (1805) 1 Webst. P. C. 82 n.

may not insert misleading details (a). If he "suppresses anything, or if he misleads, or if he does not communicate all he knows, his specification is bad, . . . but if he makes a full and fair communication, as far as his knowledge at the time extends, he has done all that is required" (b). If there are two ways of carrying out a design, of which the inventor is aware, he must state that which is most advantageous (c).

Specification
by trustee for
foreign
inventor.

If a person takes out a patent in this country as a trustee for a foreign inventor, the specification is not bad because it does not communicate everything which is known to the foreigner on the subject of the invention. The knowledge of the actual patentee is that which is to be considered (d). On the other hand, in such a case, if the specification is imperfect in not containing a fair description of the alleged invention, it is no answer to say that the patentee disclosed all that he knew (e).

Amendment
of specifica-
tion.

A specification may from time to time be amended on due application at the Patent Office, but no amendment may be made so as to claim an invention substantially larger than, or substantially different from, the existing specification (f). Even while an action is pending a patentee who has made too large a claim in his specification may by leave of the court apply at the Patent Office to disclaim a portion of it (g), but *pendente lite*, without such permission an amendment, by leave of the Comptroller of Patents, is irregular and void (h).

It has, however, been held that the subsequent presentation of a petition for the revocation of a patent does not suspend the jurisdiction of the Comptroller of Patents to grant leave to amend the specification of a patent under s. 18 (sub-s. 10) of the Act of

(a) *Crompton v. Ibbotson*, (1828) 1 Webst. P. C. 83 n.; *Bickford v. Skewes*, (1841) *ibid.* 214.

(b) *Per Bayley, J., Lewis v. Marling* (1829) 1 Webst. P. C. p. 496.

(c) *Per Alderson, B., Morgan v. Seaward*, (1837) *ibid.* p. 174; and no patent will be granted for an unworkable process: *Geipel's Patent, In re*, (1903) 2 Ch. 715.

(d) *Plimpton v. Malcolmson*, (1876) 3 Ch. D. 531.

(e) *Wegman v. Corcoran*, (1878-9) 13

Ch. D. 65.

(f) 46 & 47 Vict. c. 57, s. 18; *Jandus Arc Lamp & Electric Co., Ltd. v. Arc Lamps, Ltd.*, (1905) 92 L. T. 447; and see *Kelly v. Heathman*, (1890) 45 Ch. D. 256.

(g) See *Bray v. Gardner*, (1887) 34 Ch. D. 668, and *Gaulard v. Lindsay*, (1888) 38 Ch. D. 38; and see *Geipel's Patent, In re*, (1904) 1 Ch. 239, C. A.

(h) *Brooks & Co., Ltd. v. Lycett's Saddle & Motor Accessory Co., Ltd.* (1904) 1 Ch. 512.

1883(a). In any case of amendment no damages are recoverable for any infringement prior to the amendment, unless the patentee establishes that the original claim was framed in good faith and with reasonable skill and knowledge (b).

After the acceptance at the Patent Office of a complete specification, the applicant is protected as if he had obtained a patent (c). The patent when sealed is to bear date as from the day of application (d), and gives protection for fourteen years from that date throughout the United Kingdom and the Isle of Man, subject to the payment of certain fees (e). In some cases, however, where the patentee has been inadequately remunerated, an extension of the term for a period not exceeding seven or, in exceptional cases, fourteen years may be given, or a fresh patent, subject to conditions, may be granted (f).

Duration of patent.

Whenever the Crown grants a patent unadvisedly, such grant can always be revoked, for it is assumed that the Crown was deceived, and the patentee cannot be allowed to take advantage of such deception (g). But in all cases a petition for revocation must be heard in open court (h). Every ground on which a patent may be revoked affords also a good defence if the patentee sues for an infringement of his patent (i). In such an action, therefore, the defendant may always prove, if he can, that the grantee was not the inventor, that the invention was not new or not useful, that the specification was imperfect or misleading, or that some direct fraud has been practised in obtaining the patent (k).

Revocation of patents wrongly granted.

Invalidity a defence in action for infringement.

If a patent is bad in part, it fails entirely. When, for instance, it is granted in respect of several inventions, if the tribunal finds

Patent fails if bad in part.

(a) *Woolfe v. Automatic Picture Gallery, Limited*, (1903) 1 Ch. 18, C. A.

(b) s. 19; and see *Geipel's Patent*, *In re*, (1903) 2 Ch. 715.

(c) s. 15.

(d) s. 13.

(e) ss. 16, 17.

(f) s. 25. *Currie & Timmis's Patent*, *In re*, (1898) A. C. 347, P. C.; *Parson's Patent*, *In re*, (1898) A. C. 673, P. C.; *Thorneycroft's Patent*, *In re*, (1899) A. C. 415, P. C.; *Henderson's Patent*, *In re*, (1901) A. C. 616; *Peach's Patent*,

In re, (1902) A. C. 414.

(g) *Morgan v. Seaward*, (1837) 2 M. & W. 544.

(h) *Clifton's Patent*, *In re*, (1904) 2 Ch. 357.

(i) s. 26.

(k) *Acetylene Co. v. United Alkali Co.*, (1902) 1 Ch. 494; S. C., C. A., 72 L. J. Ch. 214; *American Steel & Wire Co. v. Glover*, (1902) 50 W. R. 284; *Consolidated Car Co. v. Came*, (1903) A. C. 509.

that one of the alleged inventions has no novelty or no utility, the patentee can maintain no action (a). "If a patent is taken out for many different things, the entire discovery of all those things is the consideration on which the king is induced to make the grant. That consideration is entire, and if it fails in any part it fails *in toto*" (b).

Intention and knowledge immaterial to infringement.

Assuming a patent to be valid, the patentee has an absolute right of property, every infringement of which gives him a cause of action, whether the party infringing knew of the patent or not, and whether he intended to infringe it or not (c). It is, however, requisite that after warning and threat of action the legal proceedings against the infringer should be prosecuted by the plaintiff with "due diligence" (d).

Infringement by article produced.

There are two kinds of questions which arise with regard to infringement; first with respect to the nature or construction of the thing itself which is alleged as an infringement; secondly, with respect to the use which has been made of the thing.

A thing is an infringement which is a substantial reproduction of the thing patented, or substantially produced by the process patented. The question, of course, is purely one of fact. The real difficulty always is to decide what exactly it is for which the patent is given. No man can claim protection for anything which does not appear in his specification. It is open to others to allege that the specification does not properly describe his invention, but it does not lie in his mouth to say so (e).

Where a patent is simply for a process, it is open to others to attain a like result by other means, provided the new method is something more than a merely improved adaptation of the earlier process (f), but it is otherwise where the process and the result are both patented (g). Where one of a series of patents (covering every known method of producing a particular article) expires

(a) *Brunton v. Hawkes*, (1821) 4 B. & Ald. 541; cp. *Morgan v. Seaward*, (1837), *supra*, p. 707.

(b) *Per* Bayley, B., *Brunton v. Hawkes*, (1821) 4 B. & Ald. p. 552.

(c) *Per* Parke, B., *Heath v. Unwin*, (1852) 25 L. J. C. P. p. 19; *per* Lord Westbury, *Curtis v. Platt*, (1864) 11 L. T. N. S. p. 250.

(d) *The Haskell Golf Ball Co. v. Hutchinson & Main*, (1904) 20 T. L. R. 606.

(e) *Per* Lord Blackburn, *Clark v. Adie*, (1877) 2 App. Cas. p. 333.

(f) *Brown v. John Hastie & Co.*, (1904) 7 F. 97, Ct. of Sess.

(g) *Badische Anilin und Soda Fabrik v. Levinstein*, (1883) 24 Ch. D. 156.

by effluxion of time, and the article in its manufactured state exhibits no indication of the method by which it has been produced, the onus of showing that a still existing patent has been infringed rests upon the party seeking the protection of the Court (a).

Where a man patented an addition to a known piece of machinery, which produced certain beneficial results in its working, it was held no infringement for others to produce the same result by substituting in the machine for the patented part something equivalent in effect but different in kind (b). But where the patent was for a machine which was a combination of old contrivances, it was held an infringement to take the mechanical equivalents of those contrivances and combine them in the same manner as the patentee had done. Here the essence of the invention was the combination, and that was directly imitated (c).

If a mere combination is patented, it is lawful to manufacture separately its component parts, though they may be capable and indeed intended for use in such combination (d). But if a man supplies all the parts of a machine ready to be put together without any special skill being required, he in effect supplies the machine as a whole, and, if as a whole it is patented, he will be guilty of infringement, although each part by itself is unprotected (e).

An invention may be divisible in various subordinate parts, and, if so, there may be an infringement by copying one of these parts. Thus, where a plaintiff had a patent for making metal wheels in one solid mass, and the defendants made wheels by the same method, except as to the rim, which they formed in a different way, it was held an infringement (f).

(a) *Saccharin Corporation v. Quincey*, (1900) 2 Ch. 246: and see *Saccharin Corporation v. Wild*, (1903) 1 Ch. 410, C. A., and *Saccharin Corporation v. White*, (1903) 88 L. T. 850.

(b) *Seed v. Higgins*, (1860) 8 H. L. C. 550.

(c) *Proctor v. Bennis*, (1887) 36 Ch. D. 740; and see *Brown v. J. Hastie & Co.*, *supra*.

(d) *M'Cormick v. Gray*, (1862) 31

L. J. Ex. 42; *Dunlop Pneumatic Tyre Co., Ltd. v. David Moseley & Sons, Ltd.*, (1904) 1 Ch. 612; 20 T. L. R. 314, C. A.; see also *Sirdar Rubber Co., Ltd. v. Wallington, Weston & Co.*, (1905) 1 Ch. 451.

(e) *Per Pearson, J.*, *United Telephone Co. v. Dale*, (1884) 25 Ch. D. pp. 782-3.

(f) *Smith v. London & North-Western R. Co.*, (1853) 2 E. & B. 69.

Repair of
patented
article
when an
infringement.

A claim for a combination may include a number of minor combinations leading up to the general result, and, if so, each of the subordinate combinations is protected (*a*), but where only the general combination is claimed, the patentee is not entitled to say that he has a monopoly in every detail of the arrangement which he has introduced (*b*). But the repair of a patented article when such repair is virtually a reconstruction of an outworn thing amounts to an infringement, and may be restrained by injunction (*c*).

Apparently, however, anything short of complete reconstruction is admissible, the purchaser of a patented article being entitled to prolong its life by "fair repair." As to what constitutes "fair repair" is a question of fact to be decided in each particular case (*d*).

Infringement
by user.

The right of the patentee is that he, to the exclusion of every one else, should make, use, exercise, and vend his invention (*e*). It is accordingly an infringement of the patent to manufacture in this country the patented article for the purpose of sale, though no sale be in fact effected (*f*). It is equally an infringement to import such article from abroad and sell it, and it makes no difference whether it is the process of manufacture or the result that is the subject of protection (*g*).

Mere possession is not sufficient, and thus a declaration which alleged as the infringement an exposing to sale was held bad on demurrer (*h*). It has, however, been held in the subsequent case of the *British Motor Syndicate v. Taylor* (*i*) that the unauthorised exposure of a patented article for sale constitutes an actionable "using and vending" of such article. Again, possession may involve a use. If a man has bottles sealed with a patented capsule, he is using the invention, inasmuch as the capsules are

(*a*) *Lister v. Leather*, (1858) 8 E. & B. 1004; and see *Saccharin Corporation v. Anglo-Continental Chemical Works*, (1901) 1 Ch. 414.

(*b*) Per Lord Hatherley, *Clark v. Adie*, (1877) 2 App. Cas. pp. 327-8.

(*c*) *Dunlop Pneumatic Tyre Co. v. Neal*, (1899) 1 Ch. 807.

(*d*) *Sirdar Rubber Co., Ltd. v. Wallington, Weston & Co.*, (1905) 1 Ch. 451.

(*e*) 16 & 47 Vict. c. 57, s. 33; Sch. 1,

Form D.

(*f*) *Oxley v. Holden*, (1860) 8 C. B. N. S. 666.

(*g*) *Von Heyden v. Neustadt*, (1880) 14 Ch. D. 230; *Badische Anilin und Soda Fabrik v. The Basle Chemical Works Bindschedler*, (1898) A. C. 200.

(*h*) *Minter v. Williams*, (1835) 4 A. & E. 251.

(*i*) (1901) 1 Ch. 122, C. A.

discharging for his benefit the very purpose for which they are intended (a). Although possession does not constitute user, there cannot well be user without possession, actual or constructive. It is not a cause of action to pass through the custom-house, as agent for another, articles which infringe a patent, even though the agent is aware of the infringement (b).

Where a patentee of an invention is in the habit of licensing the use of his invention for a fixed royalty, the measure of damages for infringement of his patent is the amount of the royalty which the infringer would have had to pay (c). Where, however, the patentee is not in the habit of granting licences, but manufactures his own invention, the measure of damages is the loss of the profit which he would have made if he had himself manufactured and sold the articles manufactured and sold by the infringer (d). If the infringer sells the patented articles at prices lower than the patentee's original prices, and the patentee to meet the competition reduces his price to the same point, the latter is entitled to recover the profit which he would have made if he had effected all the sales, both his own and the infringer's, at his own original price (e). On the other hand, if the patentee himself reduces his price below that of the infringer in order to undersell him, he can only recover the profit which he would have made if he had effected all the sales at the lower price (f). Where a patentee elects to take an account of profits, he stands in the shoes of the infringer and condones his wrongdoing (g). He is, however, under such circumstances, entitled to full disclosure of the names and addresses of the customers to whom the infringer has sold the goods, although the object of such disclosure may be proceedings against the customers for infringement (h). It has been held, in cases where a patent for

Measure of
damages.

(a) *Neilson v. Betts*, (1870-1) L. R. 5 H. L. 1; and see *British Mutoscope & Biograph Co., Ltd. v. Homer*, (1901) 1 Ch. 671.

(b) *Nobel's Explosives Co. v. Jones, Scott & Co.*, (1881-2) 17 Ch. D. 721; 8 App. Cas. 1; *Saccharin Corporation v. Reitmeyer*, (1900) 2 Ch. 659. See further, as to user, *United Telephone Co. v. Sharples*, (1885) 29 Ch. D. 164.

(c) *Penn v. Jack*, (1867) L. R. 5 Eq. 81.

(d) *United Horse Shoe & Nail Co. v. Stewart*, (1888) 13 App. Cas. 401.

(e) *American Braided Wire Co. v. Thomson*, (1890) 44 Ch. D. 274.

(f) *United Horse Shoe & Nail Co. v. Stewart*, (1888) *supra*.

(g) *Neilson v. Betts*, (1871) L. R. 5 H. L. 1 at p. 22.

(h) *Saccharin Corporation v. Chemical & Drugs Co.*, (1900) 2 Ch. 556.

the manufacture of certain goods expires during the existence of a contract for their supply by an infringer, that the measure of damages is the loss sustained by the patentee, in respect of that portion of the contract actually supplied by the infringer during the life of the patent (a).

Injunction.

As in order to obtain an injunction it is sufficient to show a threatened wrong, a possession for use is a ground for injunction, though not for damages. Thus in *Adair v. Young* (b), where the defendant was the master of a vessel at Liverpool, which had arrived in that port fitted with pumps infringing the plaintiff's patent, an injunction was granted restraining him from future use, although he had never used them except abroad, and it seems to have been considered that he had not actually been guilty of infringement (c).

Rights conferred by licence or assignment, or by sale of patented article.

If a man is possessed of patents abroad and in this country for the same invention, he cannot complain that it is an infringement of the latter, if goods sold by him under the former are imported and used in this country (d); but if he assigns or grants licences under his foreign patent, that does not give a right to introduce here the goods made by the foreign licensees or patentees (e). Patent rights in this country are now divisible, and may by assignment come into one man's hands for one part of the country, and into another's for another (f). It is apprehended that under such circumstances such different parts of the country would *quâ* the patent right become foreign to one another, and that the patentee for each part would have a right to restrain all importation.

It has, however, been held that the mere assignment of the provisional, or temporary, protection accorded to a patentee upon application for letters-patent, does not constitute such an

(a) *British Insulated Wire Co. v. The Dublin United Tramways Co.*, (1900) 1 Ir. R. 287.

(b) (1879) 12 Ch. D. 13. As to foreign ships, see 46 & 47 Vict. c. 57, s. 43.

(c) *Per* Brett, L.J., (1879) 12 Ch. D. p. 20.

(d) *Betts v. Wilmott*, (1871) L. R. 6 Ch. 239.

(e) *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Co.*, (1883) 25 Ch. D. 1.

(f) 46 & 47 Vict. c. 57, s. 36. As to licences, see *Heap v. Hartley*, (1889) 42 Ch. D. 461. As regards priorities in licences and assignments, see *New Irish Tyre & Cycle Co. v. Spilsbury*, (1898) 2 Ch. 484, C. A., affirming 46 W. R. 567.

assignment of the patent itself as will justify the assignee in suing an infringer without joining the original assignor. An agreement assigning provisional protection apparently raising no more than an equitable right in the assignee to have the valid patent transferred to him as soon as it is granted (a).

It has, moreover, been decided that if a company (the registered owners of a patent) are in liquidation, and the liquidators of the company agree to sell the assets, including the company's rights in the patent, to a third party, the assignment of such rights to the purchaser must be made before the dissolution of the company takes place, or the purchaser will not be entitled to have his name entered on the register as owner of the patent.

The legal interest in the letters-patent automatically re-vesting in the Crown upon the dissolution of the corporation to which they had been granted (b).

The grant of a patent did not formerly operate in any way to restrict the right of the Crown to the use of the invention (c). Now, however, patents granted on application made subsequently to 1883 have to all intents the like effect against the Crown as against a subject (d). Provision is made for the granting of licenses and assignments to officers of the Crown (e).

PART III.—TRADE MARKS AND TRADE NAMES.

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It is the right of every person who deals in commodities that his trade reputation should be protected, and that the customers who would naturally be attracted to him, and out of whom he might expect to make profit, should not be diverted to his rivals

Unfair use
by one trader
of the
reputation
of another.

(a) *Bowden's Patent Syndicate, Ltd. v. Herbert Smith & Co.*, (1904) 2 Ch. 86 ; S. C., (1904) 2 Ch. 122, C. A.

(b) *Taylor's Agreement Trusts. In re*, (1904) 2 Ch. 737.

(c) *Feather v. The Queen*, (1865) 6 B. & S. 257.

(d) 46 & 47 Vict. c. 57, ss. 3, 27, 45.

(e) ss. 27, 44.

How
injurious.

Rules
governing
right to
exclusive
user.

by unfair and dishonest means. "When one knowing that goods are not made by a particular trader sells them as and for the goods of that trader, he does that which injures that trader" (a). "Nothing can be better established than this, that a manufacturer is not entitled to sell his goods under the false representation that they are made by a rival manufacturer" (b). The injury done by such latter representation may be twofold. In the first place the goods dishonestly sold may be inferior to those of the person of whose make they are alleged to be, and in such case his trade reputation may suffer; in the second if there is no such inferiority, he may possibly have lost a customer who particularly desired to have his goods, and who made the purchase in question solely because he believed that he was getting them.

And this exclusive right to the use of a trade name or a trade mark in connection with a particular class of goods applies to all commodities belonging to the special class of articles in which the proprietor of the trade name or registered trade mark ordinarily deals, and in respect of which such trade mark was originally registered (c).

Thus in the case of *Boord & Son v. Huddart* (d) it was held that the plaintiffs (who were distillers) were entitled to an injunction restraining the defendant from using their trade mark in connection with the sale of a particular liqueur which the plaintiffs did not themselves manufacture at the time when the defendant adopted the mark.

And *à fortiori* this rule applies when both plaintiff and defendant are manufacturers of similar goods at the time when the defendant first imitates the plaintiff's method of distinguishing his wares. No trader being justified in taking the peculiar symbol, device or mark by which another trader

(a) *Per* Lord Blackburn, *Singer Manufacturing Co. v. Loog*, (1882) 8 App. Cas. p. 29.

(b) *Per* Jessel, M.R., *Singer Manufacturing Co. v. Wilson*, (1876) 2 Ch. D. p. 440; see *Reddaway v. Banham*, (1896) A. C. 199; *Sen Sen Co. v. Britten*, (1899) 1 Ch. 692.

(c) Trade Marks Act, 1905, s. 8 (5

Edw.VII., c.15), and see *The Anglo-Siam Condensed Milk Co. v. Pearks, Gaudin & Tee, Ltd.*, (1904) 20 T. L. R. 238, C. A. No trader is entitled to register a trade mark for goods in which he does not deal: *Batt v. Dunnell*, (1899) A. C. 428.

(d) (1904) 89 L. T. 718.

distinguishes his goods on the market, and so attracting custom to himself from his rival (*a*).

On the same principle the publisher of a work in which there is no copyright may still be protected against the sale of a work on the same subject put forward in such a form as to simulate his own (*b*). So, although as a rule there can be no copyright in a mere title, yet one man may not, in a deceptive and injurious manner, employ or colourably imitate a title already in use by another (*c*). But, in order that the earlier of the two authors or publishers may have a legal right to restrain the later from using an identical, or colourable, imitation of the title of an existing book or periodical, it is essential for him to show that such earlier user has procured for his book or periodical actual public notoriety. The mere fact that one magazine or journal anticipates another in the issue of its first number by a few days will not necessarily make an infringement of its title actionable. It is, however, an actionable fraud on an author of established reputation to sell under his name a work which in fact is not from his pen, for such a publication will either compete with his genuine works if of equal merit, or injure the author's reputation if inferior (*d*).

Works of literature.

With regard to the vexed question of the exclusive right of an author to the user of a pseudonym or pen-name, it appears probable that the rule of law prohibiting any man, engaged in business, from trading in such a way as to induce the public to believe that the goods in which he deals are in fact the goods of another applies to the profession of letters. Consequently, when by the persistent user of either an assumed proper name, or an assumed word, or collocation of words, an author succeeds in so identifying his writings with the pseudonym under which he writes, that the subsequent assumption of a similar appellation by another writer, affords *primâ facie* evidence of intent to deceive; it is but reasonable to suppose the author will be

Right of author in pseudonym or nom-de-plume.

(*a*) *Weingarten Bros. v. Bayer & Co.*, (1905) 92 L. T. 511, H. L.

(*b*) *Metzler v. Wood*, (1878) 8 Ch. D. 606.

(*c*) *Weldon v. Dicks*, (1878) 10 Ch. D. 247; *Dicks v. Yates*, (1881) 18 Ch. D.

76; see *Borthwick v. The Evening Post*, (1888) 37 Ch. D. 449.

(*d*) *Lord Byron v. Johnston*, (1816) 2 Mer. 29; *Archbold v. Sweet*, (1832) 1 Moo. & R. 162.

entitled to restrain by injunction any other person from using the same *nom-de-plume* (a).

Two kinds of
misrepresentation.
Fraud.

Infringement
of trade-
mark.

The cases of misrepresentation fall into two classes (b). First of all there are those cases where a trader has expressly or impliedly by false and fraudulent devices caused in the mind of those purchasing his goods the belief that they are in fact purchasing the goods of some one else (c), nor does innocence on the part of the infringer exonerate him from liability (d); secondly, there are those cases where a trader has been in the habit of affixing to his goods themselves or to the wrapper, case, or vessel containing the goods, some word, device, or sign, known as a trade-mark, and this trade-mark has been infringed, whether accidentally or by design, by the use of one of a substantially identical character on the part of a rival trader. The essence of a trade-mark, in the strict sense of the term, is that it is appropriated to the person who uses it. There are many trade-names and descriptions as to which there is no such appropriation, but which nevertheless will be protected against fraudulent imitation.

It is, moreover, an unfair method of trading obnoxious on the ground of deceit (though perhaps not actionable by a rival trader (e)) for a manufacturer of, or dealer in, various descriptions of goods to apply to, and display by way of public advertisement of the special quality of, one particular commodity the medals or awards which he has obtained in respect of another and totally distinct description of wares.

Previously to the year 1875, the term trade-mark was nowhere accurately defined. Especially with regard to the use of words and names, it was not always easy to discover from the decisions of the Courts what might be exclusively appropriated and what not. It is now, however, provided by section 9 of the Trade Marks Act, 1905 (f) (which comes into operation on April 1st,

(a) And see *Clemens v. Belford*, (1883) (an American case), reported 11 Bissell's reports, 459.

(b) *Per* Jessel, M.R., *Singer Manufacturing Co. v. Wilson*, (1876) 2 Ch. D. pp. 441-4.

(c) *Pinet et Cie v. Maison Louis Pinet, Ltd.*, (1898) 1 Ch. 179; *Jameson*

v. Dublin Distillers' Co., (1900) 1 Ir. R. 43.

(d) *Thwaites & Co. v. McEilly*, (1904) 1 Ir. R. 310.

(e) *F. King & Co. v. Gillard & Co.* (1905) 2 Ch. 7, C. A.

(f) 5 Ed. VII. c. 15.

1906), that a registrable trade-mark must consist of at least one of the following essential particulars :—

(1) The name of a company, individual or firm represented in a special or particular manner ;

(2) The signature of the applicant for registration or some predecessor in his business ;

(3) An invented word or invented words ;

(4) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname ;

(5) Any other distinctive mark, but a name, signature or word or words, other than such as fall within the descriptions in the above paragraphs (1, 2, 3, 4) shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark (a).

Prior to statutory enactment it was however clear that no one could claim an exclusive right to the use of some purely descriptive expression. Every one has a right to the ordinary use of the English language, and it would be unjust for one manufacturer to prevent another using a natural expression for the purpose of describing his goods. Accordingly it was held that a brewer who had been in the habit of putting on his bottles a label with words “nourishing stout,” had no right to restrain another brewer from the use of the like words on his labels (b). However a name primarily descriptive may acquire a special secondary signification, and in the trade come to denote the goods of a particular maker, or some special class or quality of goods. Secondary significations have been attached to names which primarily denote either the material of which the goods are made (c), or the place of origin (d), and the Court will restrain persons from using such a name with intent to deceive. It was however decided by the Privy Council in the recent case of the *Grand Hotel Company of Caledonia Springs v. Wilson* (e), that

Trade-marks
apart from
statute.

Descriptive
words.

Geographical
words.

(a) Trade marks in use before August 13th, 1875, need not in all respects conform with the above requirements.

(b) *Ragget v. Findlater*, (1873) L. R. 17 Eq. 29.

(c) *Reddaway v. Banham*, (1896) A. C. 199.

(d) *Radde v. Norman*, (1872) L. R. 14 Eq. 348 ; *M'Andrew v. Bassett*, (1864) 33 L. J. Ch. 561 ; see *Wotherpoon v. Currie*, (1872) L. R. 5 H. L. 508 ; *Montgomery v. Thompson*, (1891) A. C. 217.

(e) (1903) 89 L. T. 456.

the defendant could not be restrained from using the place of origin of a natural product as part of its description, although the plaintiffs thereby suffered damage (a).

Name of firm
or individual
trader.

The name of a firm or individual might be a trade-mark good as against the world in general (b). Other persons, however, of the same name could not be prevented from using such name, provided they did so without intent to deceive (c). But the trade use of an identical or very similar name, hitherto appropriated to a particular article, affords *prima facie* evidence of intention to deceive, and will be restrained by injunction (d). And the same rule applies when the appellation has been assumed by inadvertence (e).

Rights of
registered
owner of
identical
or similar
trade-marks.

Where, however, two or more persons are registered proprietors of the same (or substantially the same) trade-mark in respect of the same goods, no rights of exclusive user of such trade-mark are (except so far as their respective rights may be defined by the Court) capable of acquisition by any one of such persons as against any other merely by the registration thereof, although each of such persons otherwise has the same rights as if he were the sole registered proprietor thereof (f).

Fancy or
invented
words.

Generally, however, a trader who wished to appropriate a word to his own use had to employ one chosen in an arbitrary and fanciful manner, and having no natural connection with the goods to which it was applied (g). Familiar instances of fancy

(a) And see s. 9 (sub-s. 4) Trade Marks Act, 1905.

(b) *Per* Lord Kingsdown, *Leather Cloth Co. v. American Leather Cloth Co.*, (1865) 11 H. L. C. p. 538.

(c) *J. & J. Cash, Ltd. v. Joseph Cash*, (1902) 86 L. T. 211; *Burgess v. Burgess*, (1853) 3 De G. M. & G. 896; *Turton v. Turton*, (1889) 42 Ch. D. 128; *Saunders v. Sun Life Assurance Co. of Canada*, (1894) 1 Ch. 537; *cp. Massam v. Thorley's Cattle Food Co.*, (1880) 14 Ch. D. 748; *Croft v. Day*, (1843) 7 Beav. 84. A trader cannot have any exclusive right to the use of a mere address: *Street v. Union Bank of Spain and England*, (1885) 30 Ch. D. 156. *A fortiori*, no one can appropriate an address for purposes unconnected with business: *Day v. Brownrigg*, (1878) 10

Ch. D. 294.

(d) *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.*, (1900) 83 L. T. 259; *Jameson v. Dublin Distillers' Co.*, (1900) 1 Ir. R. 43.

(e) *North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.*, (1899) A. C. 83.

(f) Trade Marks Act, 1905, s. 39. This provision is, however, apart from an order of the Court, restricted to trade marks in use before August 13th 1875; see s. 19, Act 1905.

(g) For recent examples of words that have been held non-registrable, see *Christy v. Tipper*, (1905) 1 Ch. 1, C. A. ("Absorbine"); *Hommel v. Gebrüder Bauer & Co.*, (1904) 20 T. L. R. 585 ("Hæmatogen"), S. C., affirmed on appeal, (1904) 21 T. L. R. 81.

names are afforded by the cases of *Ford v. Foster* (a), and *Burroughs, Wellcome & Co.'s Trade Mark, In re* (b), in the former of which the use of the word *Eureka* was allowed as a good trade-mark to a shirt-maker (c), and in the latter the word *Tabloid* as a registrable trade mark for certain productions of a manufacturing chemist. Where, however, the fancy word is no more than a phonetic misspelling of one or more colloquial English words, it will not be regarded as an "invented word" within the meaning of sec. 9 (ss. 4) of the Trade Marks Act, 1905 (d). It is not, however, in all cases necessary that the "invented word" should be absolutely new (e). But as on the one hand a descriptive word might acquire a secondary signification (f), in which it was capable of appropriation, so a fancy word might come to be merely descriptive and the common property of everybody rightfully selling the class of goods which it described. Where a word, originally used only by one trader, is employed by others in the same line of business, the test by which a decision is to be arrived at whether the word has become *publici juris* is whether the use of it by other persons is still calculated to deceive the public; "whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods" (g). Everyone may now manufacture Harvey's sauce or Liebig's extract of meat and sell them under those names, such names having come to denote merely a particular kind of sauce or extract, and having ceased to suggest to the purchaser that the

(a) (1872) L. R. 7 Ch. 611. The infringement of a fancy name will be restrained without proof of intent to deceive, because the defendant can have had no other intent. See *per* Lord Herschell, *Reddaway v. Banham*, (1896) A. C. p. 210.

(b) (1904) 91 L. T. 58, C. A.

(c) And see *Eastman Photographic Co. v. The Comptroller-General of Patents*, (1898) A. C. 571.

(d) Replacing s. 10 of the Patents, Designs and Trade Marks Act, 1888, and see "*Uneda*" *Trade Mark, In re*, (1902) 1 Ch. 783, C. A., and *Ripley's Trade Mark, In re*, (1898) 78 L. T. 367,

C. A.

(e) *Linotype Co.'s Trade Mark, In re*, (1900) 2 Ch. 238.

(f) As to what will and what will not constitute a secondary or special meaning, so as to entitle to registration, see *Cellular Clothing Co. v. Maxton*, (1899) A. C. 326; *Louise & Co. v. Gainsborough*, (1903) 87 L. T. 591; *Faulder & Co.'s Trade Mark, In re*, (1902) 1 Ch. 125; and *Hommel v. Gebrüder, Bauer & Co.*, (1904) 21 T. L. R. 80, C. A.

(g) *Per* Mellish, L.J., *Ford v. Foster*, (1872) L. R. 7 Ch. 611, at p. 628.

thing sold comes from the manufactory of the persons by whom the names were first exclusively employed (a).

Again, there can be no exclusive proprietary right in a descriptive word that aptly designates the material or substance from which a manufactured article is made. Thus the use of the word "naptha" cannot be monopolised by one soap maker, but may be employed by any one engaged in the soap trade (b).

Name of new
invention.

When some entirely new invention is brought forward, the designation under which it is introduced to the public is necessarily descriptive, however arbitrarily chosen. Such a designation is not a mere nickname, but the fit and appropriate term to employ in describing the article. Thus where a patent had been taken out for a substance called "Linoleum," it was held that after the patent had expired people other than the patentee might manufacture and sell the same substance under the same name (c). This view has, however, upon different facts, been dissented from by the Court of Appeal (Cozens-Hardy, L.J., diss.), in the more recent case of *Cheesebrough's Trade Mark "Vaseline," In re* (d).

Mere
infringement
not easily
distinguish-
able from
fraud.

Cases of infringement of a trade mark were not always easily distinguishable from cases of fraudulent imitation of a trade name or trade description.

In *Wotherspoon v. Currie* (e), the plaintiff was a starch manufacturer, who had originally carried on his trade at a place with very few inhabitants called Glenfield. This starch was labelled Glenfield starch, and under that name acquired a great reputation. He subsequently transferred his works elsewhere, and the defendant took a portion of the plaintiff's old premises and manufactured starch there, which he also sold as Glenfield starch, using various devices to lead customers to believe that

(a) *Lazenby v. White*, (1871) 41 L. J. Ch. 354 n.; *Liebig's Extract of Meat Co. v. Hanbury*, (1867) 17 L. T. N. S. 298.

(b) *Fels v. Thos. Hedley & Co., Ltd.* (1903) 20 T. L. R. 69, C. A.; and see *N. K. Fairbank Co. v. Cocos Butter Manufacturing Co.*, (1903) 20 T. L. R. 53.

(c) *Linoleum Manufacturing Co. v.*

Nairn, (1878) 7 Ch. D. 834. See *per* Fry, J., *Siebert v. Findlater*, (1878) 7 Ch. D. at p. 813; *per* Fry, L.J., *Waterman v. Ayres*, (1888) 39 Ch. D. p. 38. *per* Stirling, J., *Powell v. Birmingham Vinegar Brewery Co.*, (1894) 3 Ch. pp. 456-460.

(d) (1902) 2 Ch. 1, C. A.

(e) (1872) L. R. 5 H. L. 508.

his was *the* Glenfield starch. The defendant was absolutely restrained from the use of the word Glenfield, to a great extent on the ground that it had become exclusively appropriated to the plaintiff, but great stress was also laid on the fact of the defendant's fraud. It may be that if he had been able to show that he used the word Glenfield in a fair and proper manner to describe his place of business, taking care to distinguish his labels and packages from those of the plaintiff, his conduct would have been justifiable (a). Where, however, there is no probability of the public being deceived by the misrepresentation, as a general rule no injunction will be granted (b).

In *Massam v. Thorley's Cattle Food Co.* (c) the plaintiff, as executor, carried on the business of one J. Thorley, who had for a long time manufactured by a secret process a material which he sold as Thorley's Food for Cattle. On his death a rival company was started, in which J. W. Thorley, a brother of J. Thorley and possessed of his secret, was a small shareholder and manager. This company sold packages made to resemble those of the plaintiff's, which were labelled "Thorley's Food for Cattle." It was considered in the first place that the plaintiff had a right good against the world in general to the use of the term in question, and that, although this right did not extend so far as to enable him to prevent J. W. Thorley from selling the same food under his own name, yet the latter must not do so fraudulently, in such a manner as to make the public think when purchasing his food that they were getting the manufacture of the plaintiff (d).

The separate assignment of the right to use a trade name Assignment of
trade name.

(a) See *Thompson v. Montgomery*, (1889) 41 Ch. D. 35; *Reddaway v. Banham & Co.*, (1896) A. C. 199; and see *Sen Sen Co. v. Britten*, (1899) 1 Ch. 692.

(b) *Lever Bros., Ltd. v. Bedingfield*, (1899) 80 L. T. 100.

(c) (1880) 14 Ch. D. 748.

(d) The mere fact that the defendant uses his own name will not be evidence of fraud even though the probability is that the public will be occasionally misled by it (*Turton v. Turton*, (1889) 42

Ch. D. 128); and see *Montreal Lithographing Co. v. Sabiston*, (1899) A. C. 610, P. C., and *Melrose Drover v. Heddle*, (1902) 4 F. 1120, Ct. of Sess.; but where he uses a name which is not his name, it may be presumed that he does it to represent the goods he sells as the goods of the person whose name he uses (*Burgess v. Burgess*, (1853) 3 De G. M. & G. 896), and the inference will be strengthened if he uses vessels and labels like those of the original firm (*Croft v. Day*, (1843) 7 Beav. 84).

unconnected with any business is invalid (a). Nor is a trader entitled to register a mark for goods in which he does not deal (b).

Assignment of
trade mark.

In the case of a properly registered trade mark, it is provided by s. 38 of the Trade Marks Act, 1905 (c), that "Subject to the provisions of this Act (1) The person for the time being entered in the register as proprietor of a trade mark shall, subject to any rights appearing from such register to be vested in any other person, have power to assign the same, and to give effectual receipts for any consideration for such assignment.

Limitations
in assignment
of trade
marks.

No trade mark may, however, be assigned or transmitted save in connection with the goodwill of the business concerned in the goods for which it was registered, and the right of the assignee is determinable, with the determination of the goodwill (d).

Name of
company.

Under s. 20 of the Companies Act, 1862, the registration of a company under a name identical with that by which a subsisting company is already registered or so nearly resembling the same as to be calculated to deceive is prohibited (e). The

Trade marks
by statute.

statutory right to trade marks, subsequently to April 1st, 1906, depends upon the Trade Marks Act, 1905 (f), which consolidates and amends preceding legislation. Under this Act (which replaces 46 & 47 Vict. ch. 57, as amended by 51 & 52 Vict. ch. 50) a register of trade marks is established.

Registration
a condition
precedent
to the
institution
of proceed-
ings for
infringement.

Section 42 of this Act provides that no person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark, unless such trade mark was in use before the 13th of August, 1875, and has been refused registration under the provisions of the Act, although in such cases the Registrar may on request grant a certificate that registration has been refused. Section 12 enacts that any person claiming to be the proprietor of a trade mark, who is desirous of registering the same, may apply

Who may
apply for
registration.

(a) *Thorneloe v. Hill*, (1894) 1 Ch. 569.

(b) *Batt v. Dunnett*, (1899) A. C. 428; see also *Ashton's Trade Mark, In Re*, (1900) 48 W. R. 389.

(c) 5 Ed. VII. c. 15.

(d) 5 Ed. VII. c. 15, s. 22.

(e) 25 & 26 Vict. c. 89. See

Hendriks v. Montague, (1881) 17 Ch. D. 638; *Mdme. Tussaud & Sons, Ltd. v. Tussaud*, (1890) 44 Ch. D. 678; *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, (1899) A. C. 83.

(f) 5 Ed. VII. c. 15.

to the Registrar of trade marks for that purpose. And in event of the Registrar absolutely refusing the application, or only accepting it subject to modification, the Registrar shall, if required by the applicant, state in writing the grounds of his decision and the materials used by him in arriving at the same, and such decision shall be subject to appeal to the Board of Trade, or to the Court at the option of the applicant. For the purpose of registration (which must be renewed every fourteen years (s. 28)), if the mark was not in use before August 13th, 1875 (a), it must consist of or contain—

Effect of absolute or qualified refusal to register.

“(1) The name of a company, individual or firm represented in a special or particular manner; or,

(2) The signature of the applicant for registration or some predecessor in his business; or,

(3) An invented word or invented words (b); or,

(4) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or surname (c); or,

(5) Any other distinctive mark, but a name, signature, or word, or words, other than such as fall within the descriptions in the above paragraphs (1, 2, 3, and 4), shall not, except by order of the Board of Trade, or the Court, be deemed a distinctive mark.”

“Distinctive” when used in connection with a trade mark means that the particular device chosen is adapted to distinguish the goods of the proprietor of the trade mark from those of other persons (d). If the mark was in use before August 13th, 1875, it can only be registered—

Meaning of “distinctive.”

(a) if it consists of a “special or distinctive word or words letter, numeral, or combination of letters, or numerals,” and,

(b) has continued to be used (either in its original form or with additions or alterations not substantially affecting the

(a) As to when *laches* will disentitle an applicant to costs or to have an infringing trade mark expunged from the register, see *Bourne v. Swan & Edgar*, (1903) 1 Ch. 211.

(b) See *ante*, p. 718.

(c) For instances of use of geographical

name, see *Grand Hotel Co. of Caledonia Springs v. Wilson*, (1903) 89 L. T. 456, P. C., and *Clement & Cie.'s Trade Mark, In re*, (1900) 1 Ch. 114; and *ante*, p. 717.

(d) 5 Ed. VII. c. 15, s. 9.

Trade Marks Act, 1883 (as amended by the Patents, Designs and Trade Marks (Amendment) Act, 1885), and the orders of the Council made thereunder (a).

Fraudulent
trade marks
not protected.

Apart from any statute, no one can claim to be protected against the use of a trade-mark, name, or description, which is a fraud on the right of another trader, or a deception on the public, when used as an instrument of dishonest trading (b). The Act provides that no trade mark shall be registered which is identical with a mark already registered with respect to the same description of goods, or having such resemblance to it as to be calculated to deceive (c), nor "any words the use of which would, by reason of their being calculated to deceive or otherwise, be deemed disqualifying for protection in a court of justice," nor "any scandalous or obscene design" (d).

The Court will not accede to an application for registration which is made with the object of getting the benefit of an Act in the hands of a fraudulent user (e). And where there has been a concurrent user of a trade name or mark by more than one person, and one of the users has allowed it to fall into desuetude, he may not again revive its use to the prejudice of his former co-users (f).

Public user.

The trade mark or other right for which protection is claimed must in cases outside the statute have been publicly known and recognised in connection with some particular class of goods. Where there is no established reputation there can be no injury (g). A very short time, however, may suffice to make a trade mark or name recognised in a market (h). Apparently, however, in cases outside the statute protection will generally be granted, even though the plaintiff is unable to show, in addition to an established reputation for his own goods, something

(a) 5 Ed. VII. c. 15, s. 65; and see *In re Californian Fig Syrup Co.'s Trade Mark*, (1888) 40 Ch. D. 620.

(b) See *Marshall v. Ross*, (1869) L. R. 8 Eq. 651; *Ford v. Foster*, (1872) L. R. 7 Ch. 611; *Lee v. Haley*, (1869) L. R. 5 Ch. 155; *Cheavin v. Walker*, (1877) 5 Ch. D. 850.

(c) ss. 11 and 19.

(d) 5 Ed. VII. c. 15, s. 11. See *In re Dunn's Trade Marks*, (1889) 41 Ch. D. 439.

(e) *In re Fuente's Trade Mark*, (1891) 2 Ch. 166.

(f) *Daniel & Arter v. Whitehouse*, (1898) 1 Ch. 685.

(g) *Goodfellow v. Prince*, (1887) 35 Ch. D. 9; see *Schore v. Schmincke*, (1886) 33 Ch. D. 546; *Licensed Victuallers' Newspaper Co. v. Bingham*, (1888) 38 Ch. D. 139.

(h) *M'Andrew v. Bassett*, (1864) 33 L. J. Ch. 561.

amounting to an actual intention to deceive on the part of the defendant (a).

Registration is *prima facie* evidence, and registration for seven years conclusive evidence, of exclusive right to the trade mark, subject to the provisions of the Act (b). Where, however, a trade mark, applicable to an entire class of goods, though registered for more than the prescribed period, has been dormant with regard to certain goods pertaining to the class, it is liable to be expunged from the register, in relation to those particular commodities in respect of which it has not been used (c). Prior to the passing of the Act of 1905 it was held that the last words of s. 76 of the Act of 1883 left it open to any defendant in an action for infringement, at any time after registration, to contest a trade mark on the ground that it ought never to have been registered (d); in view of ss. 41 and 11 of the New Act this contention is, however, in the absence of fraud, obviously no longer tenable. The registration appears only conclusive as to what has happened subsequently thereto (e). In cases outside the Act a party may lose his right by non-user and abandonment, or by permitting the trade mark to become common property (f). A trade mark can only be registered for particular goods or classes of goods (g).

As already stated (h), a person is not entitled to institute any proceedings to prevent, or to recover damages for, the infringement of an unregistered trade mark.

When right dependent on registration.

Trade names which existed before the first registration Act do not by reason of the limitations introduced by statute, lose the protection which the law, as it then stood, gave them.

(a) *Weingarten v. Bayer*, (1905) 92 L. T. 511, H. L., reversing the decision of the Court of Appeal, reported (1903) 89 L. T. 56.

(b) 5 Ed. VII. c. 15, s. 41. This bar does not apply when the mark is one which should never have been registered at all. See *Baker v. Rawson*, (1890) 45 Ch. D. p. 531.

(c) *Hart's Trade Mark, In re*, (1902) 2 Ch. 621.

(d) *Re J. B. Palmer's Application*, (1882) 21 Ch. D. 47; *Re J. B. Palmer's*

Trade Mark, (1883) 24 Ch. D. 504; *Re Wragg's Trade Mark*, (1885) 29 Ch. D. 551.

(e) See *Mouson & Co. v. Boehm*, (1884) 26 Ch. D. 398; and see *supra* as to Concurrent User.

(f) See above, p. 719.

(g) 5 Ed. VII. c. 15, s. 8, and see *ante*, p. 714.

(h) See p. 722, and 5 Ed. VII. c. 15, s. 42. As to International and Colonial Trade Marks, see 5 Ed. VII. c. 15, s. 65, and *ante*, p. 725.

CHAPTER XXII

OFFICERS OF JUSTICE.

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Judicial and
ministerial
acts.

OFFICERS of courts of justice act either judicially or ministerially. A judicial act is one which involves the exercise of a discretion, in which something has to be heard and decided. A ministerial act is one which the law points out as necessary to be done under the circumstances, without leaving any choice of alternative courses. Every purely formal step in a legal process, and everything which is necessary to carry into execution what has been judicially decided, is ministerial.

It is not always easy to exactly distinguish between the two classes of acts. If application is made to a magistrate to issue a distress warrant against a defaulting ratepayer, he has jurisdiction to inquire as to whether the rate has been duly made and published, and as to whether it has been paid, but if satisfied on these points, he is bound to issue his warrant, and cannot deal with any question of rateability (a). The issuing of the warrant, therefore, is a ministerial act, though the preliminary inquiry is a judicial act (b). On this analogy it was sought in *Linford v. Fitzroy* (c) to recover damages against a magistrate in an action for unreasonably refusing to take bail in a case of misdemeanour, and it was contended that, though the magistrate might have a

(a) In case of tender of part payment, the magistrate may, in his discretion, issue his warrant in respect of the non-tendered part only: *Rea v. Gillespie*,

(1904) 1 K. B. 174. And see *Wiles. Ex parte*, (1903) 20 T. L. R. 150.

(b) See below, p. 744.

(c) (1849) 13 Q. B. 240.

judicial discretion as to the sufficiency of the bail tendered, yet when this preliminary condition was satisfied his duty became simply ministerial. The Court, however, held the duty could not be thus split and divided, and that it must be treated as purely judicial. In *Garnett v. Ferrand* (a) it was held that a coroner in ordering a person to be excluded from his court was acting judicially (b).

And first as to judicial acts. Responsibility depends not upon the particular office which the party holds, but upon the function which he performed on the occasion in question. Judicial acts.

Different notions on this subject seem to have prevailed formerly. Thus Holt, C.J., in *Groenvelt v. Burwell*, says: "Commissioners of bankrupts may commit a man for refusing to be examined concerning the estate of the bankrupt, but they are not judges, and their proceedings are traversable" (c). But in *Doswell v. Impey* (d) it was held that such commissioners were entitled to the full protection of the judicial position (e). Subordinate officers of courts of justice, many of whose duties are ministerial, frequently act judicially as well, and on the other hand magistrates, who are the judges of courts of summary jurisdiction, have also certain ministerial functions. Thus, the assembly of licensing justices at brewster sessions is not a court of summary jurisdiction, there being no *lis* and no controversy *inter partes* (f); apparently, however, the confirming authority is (g).

In considering the responsibility for judicial acts it is necessary to bear in mind, first, the distinction between courts of record and courts not of record, and, secondly, between the Supreme Court and courts of limited jurisdiction. Courts of record

Different
kinds of
courts.

(a) (1827) 6 B. & C. 611.

(b) See too as to the distinction between a judicial and ministerial act, *Ward v. Freeman*, (1852) 2 Ir. C. L. R. 460, in which case the Irish Exchequer Chamber were equally divided as to whether a county judge on receiving notice of appeal acted judicially or ministerially.

(c) (1699) Lord Raym. p. 467.

(d) (1823) 1 B. & C. 163, overruling *Miller v. Seare*, (1777) 2 W. Bl. 1141.

(e) So also the General Council of Medical Education appear to be acting judicially in investigating a charge of infamous conduct in a professional respect brought against a medical practitioner: *Allbutt v. The General Council of Medical Education and Registration*, (1889) 23 Q. B. D. 400.

(f) *Boulter v. Kent Justices*, (1897) A. C. 556.

(g) *Reg. v. Manchester Justices*, (1899) 1 Q. B. 571.

complains of having suffered a wrong under a judgment or order of an inferior judge has a practical means of testing the validity of the act of which he complains. Jurisdiction may be wrongly assumed through error of law or fact.

And where it appears upon the face of the summons, that a justice has no jurisdiction in a matter, yet, nevertheless, in spite of the want of jurisdiction he proceeds to adjudicate and convicts (such conviction being afterwards set aside on appeal), the mere fact of the lack of jurisdiction not being brought to the justice's notice at the time of the hearing of the summons is immaterial.

It being provided by section 2 of The Justices Protection Act, 1848 (a), that where a justice of the Peace does an act without or exceeding his jurisdiction proceedings will lie against him without alleging that the act complained of was done maliciously and without probable cause (b).

Error of law.
absence and
excess of
jurisdiction.

1. With regard to error in law, a distinction is sometimes made between absence of jurisdiction and excess of jurisdiction. If on the facts before him a judge has no competence to deal with the matter at all and nevertheless does so, he acts without jurisdiction; if, having authority to deal with it on one footing, he deals with it on another, he acts in excess of jurisdiction. An excess of jurisdiction is simply an absence of jurisdiction as to part of the proceedings.

Thus it is an excess of jurisdiction for a judge, in a trial without jury, to deprive a successful party of costs (c).

Absence of
jurisdiction.

(a) There may be an entire absence of jurisdiction from the very nature of the case dealt with, as if; prior to the passing of the Burglary Act, 1896, a court of quarter sessions should take on itself to try a man for burglary, or at the present day should try a man on a capital charge, or, a county court judge should try an action of libel, or adjudicate on the infringement of a registered trade mark (d); or from the fact that on the face of the proceedings it appears that the necessary conditions precedent have not been complied with. Thus, where a statute directed that a summons

prohibition if jurisdiction has been improperly assumed.

(a) 11 & 12 Vict. c. 44.

(b) *Polley v. Fordham*, (1904) 91 L. T. 525.

(c) *Civil Service Co-operative Society Ltd. v. The General Steam Navigation Co.*, (1903) 2 K. B. 756, C. A.

(d) *Bow v. Hart*, (1905) 1 K. B. 592. C. A.

should be served on the party charged ten days at least before the hearing, and the plaintiff, being summoned for a day within the appointed time, neglected to attend, and in his absence was convicted and imprisoned, it was held that the whole proceedings were void and the magistrate liable for the imprisonment (a). In *Jones v. Gurdon* (b) the plaintiff had been proceeded against under a statute empowering a justice of the peace to summon a party against whom a complaint had been made to appear before him, and, on appearance, to hear and determine the matter. The defendant, not being the justice before whom the information had been originally laid, convicted the plaintiff, who under this conviction was imprisoned. It was held that the defendant was liable, since the only person who had jurisdiction in the matter was the justice issuing the summons. A defect of jurisdiction may, however, be cured by appearance (c) but not by appearance under protest (d).

But there is no power in a Court or a judge to order the issue of a writ of *habeas corpus* directed to a person who, at the date of the order, is out of the jurisdiction (e).

So, if a justice issues a warrant in the first place to apprehend on a charge of an indictable offence, without a sworn information in writing, he is answerable for the arrest under the warrant, although he had good oral evidence before him, since by 11 & 12 Vict. c. 42, s. 8, an information in writing is a necessary condition of the jurisdiction to issue a warrant (f).

(b) The cases in which the question of excess of jurisdiction most frequently arises are those in which the error consists not in wrongly entertaining a matter, but in dealing with it in the wrong way. If a man is put on his trial for one offence and convicted of another, or if he is convicted of one offence and punished for another, the conviction in the one case, and the

Excess of
jurisdiction.

(a) *Mitchell v. Foster*, (1840) 12 A. & E. 472; and see *Reg. v. Cockshott*, (1898) 1 Q. B. 582.

(b) (1842) 2 Q. B. 600.

(c) *Reg. v. Hughes*, (1879) 4 Q. B. D. 614; *Moore v. Gamgee*, (1890) 25 Q. B. D. 244.

(d) *Dixon v. Wells*, (1890) 25 Q. B. D. 249.

(e) *Rex v. Pinckney*, (1904) 2 K. B.

84, C. A.

(f) *Lawrenson v. Hill*, (1859) 10 Ir. C. L. R. 177, see *Caudle v. Seymour*, (1841) 1 Q. B. 889. For other instances of absence or ouster of jurisdiction, see *Rex v. French, Roberts, Ex parte*, (1902) 1 K. B. 637; *Rex v. Londonderry Justices*, (1902) 2 Ir. R. 266; *Kinnis v. Graves*, (1898) 78 L. T. 502.

commitment in the other, are altogether bad (a). In *Davis v. Capper* (b) it was held that if a magistrate remanded a prisoner for an unreasonable time he rendered himself liable to an action of false imprisonment, his power being to remand only for such time as was reasonable (c). There is power to commit a party summoned for a breach of the peace, but a committal of such party until he find sureties without any further limitation of time is altogether bad (d). In *Leary v. Patrick* (e) the plaintiff had been convicted and ordered to pay a penalty, but the order was silent as to costs. A distress warrant was issued for the amount of the penalty and costs, and under it certain chattels of the plaintiff were seized. The plaintiff recovered in trespass for the taking of his goods. In cases of civil debt recoverable before a court of summary jurisdiction, an order of justices for payment cannot be enforced by imprisonment in default of distress without proof that the defaulter has had the means to pay between the making of the order and the issue of the warrant (f).

Moreover, the decision of a court on a question which is beyond its statutory jurisdiction is not *res judicata* and cannot therefore be pleaded as an estoppel (g).

Mere irregularity does not destroy jurisdiction.

Irregularity of procedure does not create a defect of jurisdiction. Thus if the presiding magistrate gives a decision without properly consulting his brother justices, the decision is still good in law (h). In *Bott v. Ackroyd* (i) the justices convicted the plaintiff in a penalty and costs; the conviction and warrant were drawn up and signed by them with a blank for the amount of costs, which was afterwards filled up by the clerk. It was held that this was an erroneous exercise and not an excess of jurisdiction, and that no action lay against the justices in respect of proceedings taken under the warrant (k).

(a) *Reg. v. Brickhall*, (1864) 33 L. J. M. C. 156; *Rogers v. Jones*, (1824) 3 B. & C. 409.

(b) (1829) 10 B. & C. 28.

(c) Remands where an indictable offence is charged are now regulated by 11 & 12 Vict. c. 42, s. 21, and 42 & 43 Vict. c. 49, s. 24.

(d) *Prickett v. Gratrex*, (1846) 8 Q. B. 1020; see also *Clark v. Woods*, (1848) 2 Ex. 395.

(e) (1850) 15 Q. B. 266.

(f) *Gamble, In re*, (1899) 1 Q. B. 305; *Reg. v. Truscott*, (1899) 81 L. T. 188.

(g) *Toronto Railway v. Toronto Corporation*, (1904) A. C. 809.

(h) *Penney v. Slade*, (1839) 5 Bing. N. C. 319.

(i) (1859) 28 L. J. M. C. 207.

(k) See too *Ratt v. Parkinson*, (1851) 20 L. J. M. C. 208.

In *Ackerley v. Parkinson* (a) the plaintiff had been excommunicated in the Ecclesiastical Court, for contumacy. The excommunication was afterwards set aside on appeal, on the ground that the citation served upon the plaintiff was altogether void. He thereupon brought an action on the case against the judge of the Court. It was held, however, that the action would not lie, inasmuch as the Court had possessed general jurisdiction in the matter, and the absence of a proper citation was a mere irregularity. It seems difficult to distinguish this case from *Mitchell v. Foster* (b). There, as has been seen, the absence of a proper summons was held fatal, though there was a general jurisdiction over the subject-matter.

2. It may be a question of fact whether jurisdiction exists or not, and this question may arise in respect of the very issue that is to be decided by the Court, or in respect of some subordinate or collateral matter. Error of fact.

(a) Of course, in one sense, no person in a judicial position is entitled to make an order which the facts do not justify, but, if his jurisdiction were made to depend on the correctness of his inferences, the result would be that in all cases he would be liable for a mere erroneous exercise of his judgment. The true test, however, is to inquire whether, assuming that the charge or other matter alleged before him is true, he has jurisdiction to deal with it (c). Thus, while a trespass involving a title to land, if founded on "a fair and reasonable supposition" of right, is not within the jurisdiction of justices, a conviction for a similar offence committed in assertion of an altogether untenable and absurd claim involves no ouster of jurisdiction, and will be affirmed upon appeal (d). It is a fallacy to say that "the fact which the magistrate has to decide is that which constitutes his jurisdiction. . . . Suppose the case of a conviction under the game laws for having partridges in possession; could the magistrate, in an action of trespass, be called upon to show that the In the actual decision.

(a) (1815) 3 M. & S. 411.

(b) (1840) 12 A. & E. 472; see above, p. 737.

(c) *Per Cur.*, *Cave v. Mountain* (1840) 1 M. & G. p. 262; *Polley v. Fordham*, (1904) 2 K. B. 345; *Reg. v.*

Bolton, (1841) 1 Q. B. 66; see *Ashcroft v. Bourns*, (1832) 3 B. & Ad. 684; *Louther v. The Earl of Radnor*, (1806) 8 East, 113.

(d) *Brooks v. Hamlyn*, (1899) 79 L. T. 734.

which has been illegally issued in the first instance, the remedy of the party arrested under such warrant is not against the magistrate who backed it but against the magistrate by whom it was issued (a). In *Dews v. Riley* (b) the judge of a county court having made an invalid order of commitment, the defendant as clerk of the court made out a warrant in pursuance of the order under which the plaintiff was arrested. It was held that the defendant was not liable inasmuch as he was, in accordance with his duty, simply putting into form an order of his superior officer, which he had no power to review, and consequently the issue of the warrant was not his act but the act of the judge. Where, however, the judges of an inferior court having jurisdiction to order payment of a debt in instalments, and, upon proof of default in payment, to award imprisonment, made an order for payment by instalments "or execution to issue" and left it to their clerk to subsequently issue execution on proof of default; without further intervention of the Court, it was held that the clerk in so doing was not acting ministerially, but on the contrary taking on himself an unauthorised judicial function, and was therefore liable for the consequences (c).

Failure to
carry out
step of
procedure.

It would seem that any official who wrongfully neglects to carry out any step of procedure which a party is entitled to require of him, is liable to the person so aggrieved for any damage which may be proved to have resulted. In the Irish case of *Ward v. Freeman* (d), where a county court judge was sued for refusing to receive notice of appeal in an action depending before him, the Court, while divided in opinion on the question whether the reception of the notice was a ministerial act, were agreed that, assuming it to be such, an action would lie. Judgments formerly bound the land of the judgment debtor, and if the officer whose duty it was to properly record judgment neglected in any case to do so, he was "liable to an action upon the case, to be brought by a purchaser who should have become liable to it, and had searched the roll without finding it entered up" (e).

(a) *Clark v. Woods*, (1848) 2 Ex. 395.

(b) (1851) 11 C. B. 434.

(c) *Andrews v. Marria*, (1841) 1 Q. B. 3.

(d) (1852) 2 Ir. C. L. R. 460.

(e) *Per* Lord Mansfield, C.J., *Douglas v. Yallop*, (1759) 2 Burr. p. 722: *cp. Robinson v. Gell*, (1852) 12 C. B. 191.

Under ordinary circumstances the execution of the process of the courts rests with a special class of ministerial officers—in the superior courts with the sheriffs in their respective jurisdictions, in the county courts with the high bailiffs or the registrars (a). The other inferior courts of record generally have executive officers known as serjeants-at-mace.

Executive
acts.

The legal position of all appears to be substantially the same, except in one particular. An order of a superior court is in all cases a protection to the officer executing it so long as he does not exceed his mandate, and he is not bound to take notice of any defect or irregularity attending the process, even though obvious and apparent (b). There is, indeed, one case in which the sheriff is bound to prove the validity of the judgment under which he acts. If a judgment debtor has assigned chattels in fraud of his creditors, and the sheriff seizes under a writ of *fi. fa.*, he cannot rely simply on his writ but must prove the judgment, for except as against a creditor the assignment is good, and the sheriff commits a trespass if there is no valid judgment debt (c). This, however, is an apparent, not a real exception to the general rule, the sheriff in such case being liable not because the judgment is bad, but because he has seized the wrong person's goods. But the order of an inferior court is not of itself, at common law, a conclusive protection to the officer acting under it. He is bound to scan the terms of the order, and if it appears on the face of it to be such as the Court could not legally make, he is not justified in putting it in force, since he is supposed to know the law, and, therefore, to be aware that the document is a mere nullity (d). If the order be good upon the face of it, he is fully protected in its due execution, even though he may be aware that under the circumstances of the case it was illegally issued. Where a prisoner who had been wrongfully arrested, was delivered to a gaoler under a good warrant, it was said by the Court "that if he

Order of
inferior court
does not
always pro-
tect executive
officer.

(a) 51 & 52 Vict. c. 43, ss. 33–7.

see *Demer v. Cook*, (1903) 88 L. T. 629.

(b) *Countess of Rutland's Case*, (1605) 6 Rep. 53; *Brown v. Watson*, (1871) 23 L. T. N. S. 745. As to the protection afforded to the governor of a gaol by the warrant of commitment, see *Henderson v. Preston*, (1888) 21 Q. B. D. 362; but

(c) See *White v. Morris*, (1852) 11 C. B. 1015.

(d) *Andrews v. Marris*, (1841) Q. B. 3; *Carrat v. Morley*, (1841) 1 Q. B. 18; *Watson v. Bodell*, (1845) 14 M. & W. 57.

had been informed of the tortious taking (without being of the covin, or practising therein) he ought, nevertheless, to detain the prisoner, being delivered to him with a good warrant for arrest, though the execution of it was illegal ; for if such information had been false, and the gaoler had set the prisoner at large, he had been liable to be sued for the escape " (a).

Where a statute expressly provided that officers acting in obedience to the order of an inferior court should be indemnified against the consequences, it was held that this language covered the case of obedience to an order which appeared upon the face of it to have been made without jurisdiction (b).

County court
executions.

In county court executions the authority of the Court is sufficiently proved by the production of the warrant under the seal of the Court, and the officers levying the execution are protected notwithstanding "any defect of jurisdiction or other irregularity in the said warrant" (c). They do not become trespassers *ab initio* by any irregularity in the course of the execution but are liable for the special damage caused thereby (d).

Responsi-
bility for
subordinates.

The responsibility of the sheriff or other executive officer is not merely that of putting the process of the Court in due train for being executed, he is absolutely liable in every respect for the conduct of the subordinates whom he must necessarily employ (e). Whatever they do, however lawlessly, or however contrary to orders, is imputable to him, provided it was done as part of the execution. Thus where, under an execution in the county court, goods belonging to a third party (entitled to immediate possession) were seized and sold, the bailiff was held liable in trover to the owner (f). Again in *Smart v. Hutton* (g) a writ of *fi. fa.* had been taken out against the plaintiff. The sheriff's officer, not finding sufficient goods to satisfy the amount endorsed, took him into custody, and it was held that the sheriff was liable for the false imprisonment. On the same principle, though ordinarily *delegatus non potest delegare*, the sheriff is answerable for the acts

(a) *Per Cur.*, *Olliet v. Bessey*, (1682) T. Jones, p. 214.

(b) *Saffery v. Jones*, (1831) 2 B. & Ad. 598.

(c) 51 & 52 Vict. c. 43, ss. 52, 54-5.

(d) s. 52.

(e) As to county court bailiffs. see 51 & 52 Vict. c. 43, s. 85.

(f) *Jelks v. Hayward*, (1905) 2 K. B. 460.

(g) (1833) 8 A. & E. 568, n.

of the depnty appointed by his officer (a). But he is not liable if the act of the bailiff is not under colour of the writ, or done in the pretended execution of it. It was accordingly held that a sheriff could not be charged with a breach of duty because the bailiff had not paid over money received in discharge of a judgment debt from a party arrested on a *ca. sa.*, it being the bailiff's duty simply to make the arrest and not to receive the money (b).

If, however, the sheriff appoints a special bailiff at the instance of a party concerned in an execution, such party cannot complain of any particular act of misconduct on the part of his own nominee (c). He does not, however, free the sheriff from his general responsibility towards him in the matter (d). So, if a party induces a bailiff in any way to act contrary to his duty, he cannot afterwards be heard to complain of that particular breach of duty, but he may bring his action in respect of any other misconduct of the officer by which he may have suffered damage (e). Thus, where an execution debtor persuaded a sheriff's officer to postpone a sale of the goods seized, his interference did not disentitle him from recovering the loss caused by the careless conduct of the sale itself (f).

The sheriff or other officer charged with the execution of the process of a Court has a duty towards the party at whose instance the process issues, and the party against whom it is issued. He has a duty also towards the trustee in bankruptcy and towards the landlord of the execution debtor. He is liable, moreover, for any act not covered by the authority of the process, and which by itself is a trespass or conversion (g).

It will be convenient to consider the various successive steps of an execution, pointing out the liability which may arise upon each.

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|---|--|
| (a) <i>Gregory v. Cotterell</i> , (1855) 5 E. & B. 571. | 13 M. & W. 42. |
| (b) <i>Woods v. Finnis</i> , (1852) 7 Ex. 363. See also <i>Smith v. Pritchard</i> , (1849) 8 C. B. 565. | (d) <i>Taylor v. Richardson</i> , (1800) 8 T. R. 505. |
| (c) <i>De Moranda v. Dunkin</i> , (1790) 4 T. R. 119. As to what amounts to procuring the appointment of a special bailiff, <i>Ford v. Leche</i> , (1837) 6 A. & E. 699; <i>Bailson v. Meggat</i> , (1836) 4 Dowl. P. C. 557; <i>Alderson v. Davenport</i> , (1844) | (e) <i>Cook v. Palmer</i> , (1827) 6 B. & C. 739; <i>Botten v. Tomlinson</i> , (1847) 16 L. J. C. P. 138; <i>Crowder v. Long</i> , (1828) 8 B. & C. 598. |
| | (f) <i>Wright v. Child</i> , (1866) L. R. 1 Ex. 358. |
| | (g) <i>Jelks v. Hayward</i> , (1905) 2 K. B. 460. |

Special
bailiffs.

Duty of
execution
officer.

Making
inquiry.

Seizure and
arrest.

The sheriff or other officer is, in the first place, bound to make inquiry as to the presence of the debtor (a) or his property within the limits of the bailiwick, and he has no right to demand information of the execution creditor as a condition precedent to taking action (b). He must next proceed to enter into possession or arrest, as the case may be. A sheriff must provide himself with such force as to overcome any resistance which may be reasonably anticipated (c), but he is not liable if the process is defeated by reason of unexpected contingencies (d). An execution ought to proceed without unreasonable delay, but there is no obligation to act at the very earliest moment possible; what is reasonable is a question of fact for the jury under the particular circumstances of each case (e). In *Hooper v. Lane* (f) the sheriff having in his hands two writs, one valid and the other invalid, arrested a party under the invalid writ, being guilty of negligence in so doing. In consequence the party was discharged from custody and left the country before there was time to re-arrest him under the valid writ. It was held that the creditor whose writ had thus been defeated had good cause of action against the sheriff. The creditor may, after process is delivered, suspend the execution, and while the suspension continues there is no authority to act in the matter (g).

Right of
entry.

An English-
man's house
his castle.

It is lawful to enter upon the house or land of an execution debtor in order to search for and seize his person or property, according to the nature of the execution. But a special sanctity attaches to the dwelling-house, which is an Englishman's castle, and may not be broken open, even after demand of admittance made and refused. In many of the old cases it is said that the sheriff may only enter if the door be open, and accordingly it is laid down that he is a trespasser if he goes in by lifting the

(a) Imprisonment for debt was abolished by 32 & 33 Vict. c. 62, but s. 4 makes certain exceptions. By s. 6, arrest on mesne process is abolished except in certain cases when the defendant is about to quit the country.

(b) *Dyke v. Duke*, (1838) 4 Bing. N. C. 197.

(c) See 50 & 51 Vict. c. 55, s. 8.

(d) *Howden v. Standish*, (1848) 6 C. B. 504; *Hodgson v. Lynch*, (1871) Ir. Rep. 5 C. L. 353.

(e) *Brown v. Jarvis*, (1836) 1 M. & W. 704; *Hobson v. Thelluson*, (1867) L. R. 2 Q. B. 642.

(f) (1856) 6 H. L. C. 443.

(g) *Barker v. St. Quintin*, (1844) 13 M. & W. 441.

latch (a), but this has been questioned **(b)**. He may enter by **lifting a window partially open**, for this would not be a breaking **even in burglary (c)**. Any outbuilding not adjoining or being **part of a dwelling-house** may be forced **(d)**.

“The house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed to his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore, in such cases, after denial on request made, the sheriff may break the house” **(e)**. However, he enters at his peril, whether he does so peaceably or not. He has no right of entry for the purpose of search, but is only justified if the person whom he desires to arrest or the goods which he desires to seize are in the house **(f)**.

Not to protect strangers.

If an entry has once lawfully been made through the outer door it is lawful, without demand or refusal, to break open inner doors subsequently for the purpose of making a seizure or arrest, and it would seem for the purpose of making search **(g)**.

Inner doors.

According to the principle laid down in *Semayne's Case* a man is not to be regarded as a stranger to a house if he is ordinarily resident there, although he is not the occupier, nor are his goods to be regarded as a stranger's goods if they are ordinarily deposited there. There is, therefore, in such cases on the one hand, a right of search after peaceable entry, on the other hand a protection against forcible entry. In *Cooke v. Birt (h)* the plaintiff sued the sheriff for breaking and entering his house. The defendant justified under a writ of *fi. fa.*, directing him to seize any goods which were in the hands of the plaintiff's wife as

Who is a stranger.

(a) Com. Dig. Execution, C. 5. See Q. B. 663.

too *Curtis v. Hubbard*, (1841) 1 Hill's Rep. New York, 336.

(b) *Per Cur.*, *Ryan v. Shilcock*, (1851) 7 Ex. p. 77.

(c) See *Crabtree v. Robinson*, (1885) 15 Q. B. D. 312; a case of distress.

(d) *Penton v. Brown*, (1664) 1 Sid. 186; *Hodder v. Williams*, (1895) 2

(e) *Semayne's Case*, (1604) 5 Rep. p. 93.

(f) *Morriah v. Murrey*, (1844) 13 M. & W. 52.

(g) *Hutchison v. Birch*, (1812) 4 Taunt. 618; see *Lee v. Gansel*, (1774)

1 Cowp. 1.

(h) (1814) 5 Taunt. 765.

administratrix, and alleged that having good reason to suspect that there were in the plaintiff's house goods liable to be seized under the writ, he entered peaceably through an open door to search for them, and it was held that the plea was good, because the plaintiff's house was the place in which the property in question might be supposed to be. In *Sheers v. Brooks* (a), which was a case of a bail seeking to arrest his principal, it was said there was no difference between a house of which a man was possessed and one in which he resided by the consent of another. In *Lee v. Gansel* (b) it was held that a lodger was not entitled to the protection of the inner door of his room, and assumed that he was entitled to the protection of the outer door.

Forcible
re-entry.

Where a lawful entry has been effected and the officer is expelled, he may forcibly break in again without any previous demand (c); and so, where there has been a rescue or escape, in order to effect a recapture. On this principle a sheriff's officer, having arrested a party by touching him through a hole in a window, was held justified in afterwards breaking in to enforce the arrest (d).

So it is apprehended that if a man in possession goes out for some mere temporary purpose, he does not thereby abandon the execution (e), and may, if need be, forcibly re-enter (f).

Writ of
possession.

One of the resolutions in *Semayne's Case* (g) is that "when any house is recovered by any real action or by *Eject' firmæ* the sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff, for the words of the writ are *habere facias seisinam* or *possessionem*, &c., and after judgment it is not the house in right and judgment of law of the tenant or defendant" (h).

Effect of
tortious
entry.

An arrest made by reason of a tortious entry is altogether void, and the party is entitled to his discharge, but if, under the like circumstances goods have been seized, the execution, it would seem, stands good in favour of the creditor (i).

(a) (1792) 2 H. Bl. 120.

(b) *Supra*, p. 751.

(c) *Aga Kurboolie Mahomed v. The Queen*, (1843) 4 Moore, P. C. 239.

(d) *Sandon v. Jervis*, (1858) E. B. & E. 935.

(e) *Ackland v. Paynter*, (1820) 8 Price, 95.

(f) See *Bannister v. Hyde*, (1860) 2 E. & E. 627, which, however, was a case of distress.

(g) (1604) 5 Rep. p. 92.

(h) As for ejectment in the county court, see 51 & 52 Vict. c. 43, ss. 142-4.

(i) *Per Parke, B., Percival v. Stamp* (1854) 9 Ex. pp. 171-2.

By 29 Car. II. c. 7, s. 6, all executions made on a Sunday in civil matters are illegal and void. The statute only applies to the original execution; there may be, after an escape or rescue, a lawful retaking on a Sunday (*a*). Where an execution creditor had procured the arrest of his debtor on a Sunday on a criminal charge, whereby the debtor was detained until Monday, and then upon his discharge was at once arrested on a *ca. sa.*, it was held that the latter arrest having been made by means of the former, must be considered as within the prohibition of the statute (*b*).

Execution on Sunday.

There is no restriction at common law as to the time of day during which process may be executed (*c*). However, in county court ejectments entry can only be made between the hours of nine in the morning and four in the afternoon (*d*).

Hour of execution.

If any process be executed within a privileged place, or on a privileged person, the process will be set aside on application to the Court, but no action will lie against those who acted in obedience to a lawful writ or order. Such privilege rests on general grounds of public policy, and, therefore, though it will be enforced by release of the person or property seized, there is no individual grievance to be remedied by action. "In all the cases of privilege, whether on the ground of the person being a member of the Legislature, or having a duty to perform about the person of the Queen, or from any other cause, it has always been considered that the sheriff is justified if he obeys the commands of the writ, and that the privileged party must apply to the Court for his discharge. The same principle applies to goods which are protected" (*e*). It makes no difference if it be alleged that the execution was made maliciously and with knowledge of the facts constituting privilege, for where no right is infringed malice is immaterial (*f*).

Privilege from execution.

However, with regard to ambassadors and their servants the

Privilege of ambassadors.

- (*a*) *Atkinson v. Jameson*, (1792) 5 T. R. 25. (1856) 11 Ex. p. 852.
 (*b*) *Wells v. Gurney*, (1828) 8 B. & C. 769. (*f*) *Magnay v. Burt*, (1843) 5 Q. B. 381. The privilege is that of the Court, not of the person; therefore, the remedy in such case is to apply to have the party making the arrest or seizure punished for contempt; *per Cur.*, *ibid.*, p. 395.
 (*c*) *Per* Lord Campbell, C.J., *Brown v. Glenn*, (1851) 16 Q. B. p. 257.
 (*d*) 51 & 52 Vict. c. 43, s. 142.
 (*e*) *Per* Alderson, B., *Rideal v. Fort*,

privilege is absolute, since, by 7 Anne, c. 12, all process against them is null and void to all intents and purposes.

Execution
against
liquidating
companies.

By the joint effect of ss. 85, 87, 163, of 25 & 26 Vict. c. 89, no execution can be put in force, *i.e.*, no seizure can be made under a *fi. fa.* (a) against a company after the commencement of its winding-up in Court, unless the leave of the Court has been first obtained. If no such leave has been granted it would seem that the entry and the seizure are respectively trespasses, for the words of the Act are that the execution shall be void to all intents and purposes. No action, however, seems ever to have been brought by a liquidator in respect of any such trespass. The practice is to obtain an order from the Court, in which the liquidation proceedings are pending, for the withdrawal of the execution, and in some cases where such application has been made the Court has ratified and allowed the continuance of a proceeding which was void to all intents and purposes in its inception (b).

Responsible
officer must
be present at
execution.

The responsible officer entrusted with the writ must personally attend to supervise its execution (c), otherwise there is no legal process, and it is to be presumed that he should have the writ with him, according to the analogy of procedure in criminal cases (d).

Party wrong-
fully arrested
must be
discharged.

The right of a party arrested in a wrongful or irregular manner to his discharge is absolute as against those who are responsible for the arrest. If a debtor has been taken under a void writ the creditor cannot afterwards sue out a writ which is good, and justify under it a continuance of the imprisonment. If a sheriff has two writs to execute and one is bad, and he arrests under it, he cannot detain under the other. In both cases the right of the debtor is to be discharged, and having been discharged he may subsequently be arrested. But the fact of wrong having been committed does not affect the right of a stranger to that wrong to pursue his legal remedy, and he may execute his process

(a) *In re London & Derox Biscuit Co.*, (1871) L. R. 12 Eq. 190. pp. 234-8.

(b) *Re Bastow & Co.*, (1867) L. R. 4 Eq. 681; *Ex parte North Staffordshire R. Co.*, (1874) L. R. 19 Eq. 60. See Buckley on the Companies Acts, 6th ed.

(c) *Rhodes v. Hull*, (1857) 26 L. J. Ex. 265.

(d) *Codd v. Cabe*, (1876) 1 Ex. D. 352.

wherever the party can be found, whether in custody or out of custody (*a*).

With regard to executions against lands under writs of *elegit*, *Elegit.* no question arises as to the sheriff's duty, insomuch as he has not actually to take possession, but after holding inquiry to give the creditor a right of entry, leaving to him the responsibility of enforcing it.

The lawfulness of a seizure of goods under a writ of *fi. fa.* *Fi. fa.* depends partly on the nature of the goods themselves, partly on the nature of the debtor's interest in them.

A leasehold being a chattel interest may be seized and sold, but it is not the duty of the sheriff or other executive officer to give the purchaser possession, he has simply to enter, sell and assign; and if he continues on the premises afterwards he is a trespasser as against the execution debtor, provided the latter has remained in actual possession (*b*). What chattels
may be taken.
Leaseholds.

Crops which are raised from year to year by the labour of man's hands—*fructus industriales*—are regarded as chattels even while they are still in the soil, but not so the permanent growth of the land such as grass and fruit. The former may therefore be taken under a *fi. fa.*, the latter not (*c*). However, by 56 Geo. III., c. 50, no growing crop, which by covenant with his landlord a tenant is bound to consume on the premises, can be sold under an execution except subject to the covenant, provided that notice be given. Crops.

As a general rule fixtures may not be seized under a *fi. fa.*; but all which a tenant has a right to remove as against his landlord may be taken in execution against the former (*d*). Fixtures.

Money, notes, bills, and other securities may be taken in execution (*e*). The actual coins, which are appropriated and set apart in the hands of a third person for the debtor, are liable to seizure, but a mere debt is not (*f*). Money,
notes, &c.

(*a*) *Humphery v. Mitchell*, (1836) 2 Bing. N. C. 619; *Eggington's Case*, (1853) 2 E. & B. 717; *Hooper v. Lane*, (1856) 6 H. L. C. 443.

(*b*) *Playfair v. Musgrove*, (1845) 14 M. & W. 239.

(*c*) *Per Bayley, J., Erans v. Roberts*, (1826) 5 B. & C. p. 832

(*d*) *Dumergue v. Rumsey*, (1863) 2 H. & C. 777; *Winn v. Ingilby*, (1822) 5 B. & Ald. 625.

(*e*) 1 & 2 Vict. c. 110, s. 12; 51 & 52 Vict. c. 43, s. 147.

(*f*) *Wood v. Wood*, (1843) 4 Q. B. 397; *Brown v. Perrot*, (1841) 4 Beav. 585.

Clothes,
bedding and
tools.

The wearing apparel and bedding (including bedstead) (a) of any judgment debtor or his family, and the tools and implements of his trade (b) to the value of five pounds, are protected from execution (c).

Rolling stock.

Protection is likewise given to the rolling stock of railway companies (d).

Things out of
possession.

It seems clear that if the present right of possession of goods has been parted with by the owner, whether by way of pledge, letting or lien, such goods cannot be seized in an execution against him; for the seizure would be an act of trespass against the possessor (e). On the other hand, if the execution debtor has a present right of possession amounting to a special property that interest can be seized and sold (f). In the case of heir-looms, the vendor or pawner cannot convey to the vendee or pawnee a larger property in the goods than he himself possesses (g). The mere sale does not affect the right of the owner of the reversion, because it does not pass his property, but if there be a sale in market overt, then the reversionary estate is injured and the owner has a cause of action (h). In the same way if the execution debtor is tenant in common or joint tenant of any goods, they may be taken in execution for his debt and his interest in them sold, and the other owners can sue in trover only if by reason of a sale in market overt or otherwise they are entirely ousted. The sheriff becomes their co-owner, and is only liable for acts which as between co-owners are tortious (i). Goods held by a debtor under a lien cannot be taken in execution; for the lien is a mere personal right and not a property capable of transfer (k).

(a) *Davis v. Harris*, (1900) 1 Q. B. 729.

(b) A sewing-machine hired by the wife of a judgment debtor on the instalment system is an implement of trade: *Masters v. Fraser*, (1902) 85 L. T. 611.

(c) 8 & 9 Vict. c. 127, s. 8; 51 & 52 Vict. c. 43, s. 147. They are similarly protected against distress issued by a Court of Summary Jurisdiction, see 42 & 43 Vict. c. 49, s. 21 (2).

(d) 30 & 31 Vict. c. 127, s. 4; 38 & 39 Vict. c. 31.

(e) *Rogers v. Kennay*, (1846) 9 Q. B. 592.

(f) *Per Parke, B., Legg v. Evans* (1840) 6 M. & W. p. 42.

(g) *Studdert v. West*, Law Times, Feb. 15th, 1902, p. 353.

(h) *Tancred v. Allgood*, (1859) 4 H. & N. 438.

(i) *Johnson v. Evans*, (1844) 7 M. & G. 240; see *Mayhew v. Herrick*, (1849) 7 C. B. 229. See above, pp. 247-49.

(k) *Legg v. Evans*, (1840) 6 M. & W. 36.

A mere equity of redemption even though coupled with possession is not the subject of a legal execution (a). Equity of redemption.

When a receiver of rents is appointed by a mortgagee, the mortgagor ceases to have a legal power of distraint (b); although a person having authority, express or implied, to distrain for rent due to the legal reversioner, may justify as bailiff to such legal reversioner, if he distrains as for rent due to himself (c).

If a man is sued in a representative capacity as executor or administrator the writ of execution is directed against the goods of the deceased, and it is clear that such a writ will not justify the seizing of the execution debtor's own goods. Conversely, if in an execution against a man personally, goods are seized which he holds in a representative capacity or in trust, the act is not justified by the writ, and he may sue in trespass or trover (d). Property held in representative capacity.

It was held, however, in *Quick v. Staines* (e), where a married woman was executrix, and she and her husband had appropriated to their own use the testator's goods, that in an action by her against the sheriff for seizing those goods in an execution against the husband, she was estopped from setting up her title as executrix. In case of a devastavit.

If a man's goods have been distrained they are in the custody of the law and cannot be taken in execution (f). If officers with concurrent jurisdictions have severally executions against the same defendant, the one first in possession is, of course, entitled to keep them as against the other (g). But by 51 & 52 Vict. c. 43, s. 152, in questions of priority between County Court and High Court executions, the right to the goods is to depend not upon the date of seizure, but upon the times respectively when the writ was delivered to the sheriff or application was made to the County Court Registrar for the issue of his warrant. Goods in custody of the law.

(a) *Scarlett v. Hanson*, (1883) 12 Q. B. D. 213; *Scott v. Scholey*, (1807) 8 East, 467. trade, see *Ex parte Garland*, (1803-4) 10 Ves. 110.

(b) *Woolston v. Ross*, (1900) 1 Ch. 788. (e) (1798) 1 B. & P. 293.

(c) *Trent v. Hunt*, (1853) 9 Ex. 14. (f) *Reddell v. Stowey*, (1841) 2 Moo. & R. 358.

(d) *Farr v. Newman*, (1792) 4 T. R. 621; *Fenwick v. Laycock*, (1841) 2 Q. B. 108. As to the position of executor who has been directed to employ part of the testator's estate in (g) Com. Dig. Execution, C. 4. Under such circumstances it is usual for the officer first in possession to act as special bailiff in the execution of the second process. See *Ex parte Warren*, (1885) 15 Q. B. D. 48.

Limitations
on sheriff's
and high
bailiff's
right to
possession
money.

When several concurrent warrants of execution are issued against the goods of a judgment debtor and the high bailiff seizes sufficient chattels to satisfy the whole of the execution warrants without allocating particular goods to a particular warrant, the bailiff is only entitled to charge one possession fee on the whole. And the same rule applies where a sheriff has put a man in possession of goods under a writ of *fi. fa.* issued by one creditor, and afterwards receives and executes other writs against the same debtor from other creditors (a). But, on the other hand, if he seizes and appropriates different goods in satisfaction of each particular warrant, even though all the goods so allocated are on the premises at the same time, and possession under all the warrants is held synchronously by the same person, the bailiff is, nevertheless, entitled to possession money in respect of each particular warrant (b).

Effect of
bankruptcy.

Insomuch as the title of the trustee in bankruptcy does not commence with his appointment, but relates back to any act of bankruptcy committed by the debtor within the three months prior to the presentation of the petition, it may frequently happen that goods are taken in execution which although apparently the property of the debtor, in reality, as it ultimately turns out, belong to the trustee. Under such circumstances the sheriff was formerly liable in trover to the assignee in bankruptcy (c). Various provisions were made under successive Bankruptcy Acts for obviating this hardship, and it is now provided that an execution creditor shall not be entitled to retain the benefit of an execution against a trustee in bankruptcy, unless he has completed it by seizure and sale (d) before the date of the receiving order and before notice of the presentation of a petition or of an available act of bankruptcy (e). It is apparently implied, but not expressed that where the creditor has received no such notice as is

Duty of officer
executing
writ.

(a) *Morgan, In re ; Board of Trade, Ex parte*, (1904) 1 K. B. 68 ; *Glassbrook v. David and Vaur*, (1905) 1 K. B. 615.

(b) *Morgan, In re ; Board of Trade, Ex parte*, (1904) 1 K. B. 68. As to excessive charges for distress and statutory limitations, see *Hoadland v. Coster*, (1904) 21 T. L. R. 123, C. A., as to method of recovery of excessive charges,

see *Rex v. Bridport County Court Judge ; Edwards, Ex parte*, (1905) 2 K. B. 108.

(c) *Garland v. Carlisle*, (1837) 4 Cl. & F. 693.

(d) See *Jones v. Parcell*, (1883) 11 Q. B. D. 430.

(e) 46 & 47 Vict. c. 52, s. 45.

mentioned, he is entitled to retain the proceeds of the execution. The sheriff or other officer charged with the execution of the writ (a), if after seizure but before sale he is served with notice (b) of a receiving order, is bound upon request to deliver the goods to the official receiver or the trustee in bankruptcy. After sale, if the execution is for a judgment over twenty pounds, he is to retain the proceeds for fourteen days, and if within that time he receives notice of a bankruptcy petition "and the debtor is adjudged bankrupt thereon, or on any other petition of which the sheriff has notice," he is to pay the balance, after deducting expenses, to the trustee, otherwise he is to deal with it as if no notice had been served on him (c). In computing expenses in such case, the right of the sheriff to "possession money" is limited to twenty-one days, however long he may have been in possession prior to the bankruptcy (d). It is presumed that although the section does not, in terms, indemnify the sheriff from liability by reason of anything done under it, that no action will lie against him so long as he strictly performs his statutory duty (e).

It sometimes happens that owing to a misnomer or confusion of names a question arises whether an execution, against either the person or goods is directed against the right individual. If there are two persons of the same name and judgment goes against one of them, it is the business of the sheriff or other officer to act at his peril. If he levies execution against the wrong man he is liable to an action of trespass; if he neglects to levy execution against the right man, he is liable to an action for neglect of duty at the suit of the execution creditor.

Execution
against the
wrong party.

The writ of execution follows the form of the judgment. It is immaterial by what name an execution debtor is described provided judgment has been obtained against him in that name (f).

Must be
against party
intended to be
sued.

(a) s. 168. A man who by direction of the sheriff takes possession of and sells the goods of the judgment debtor is not "an officer charged with the execution of a writ or other process": *Bellyæ v. M'Ginn*, (1891) 2 Q. B. 227, following *Ex parte Warren*, (1885) 15 Q. B. D. 48.

(b) 53 & 54 Vict. c. 71, s. 11 (1).

(c) *Ibid.* (2).

(d) *English & Ayling, In re: Murray*

& Co., Ex parte, (1903) 1 K. B. 680. As to general rule respecting right to "possession money," see *Morgan, In re; Board of Trade, Ex parte*, (1904) 1 K. B. 68.

(e) In the corresponding section of the Act of 1861 (24 & 25 Vict. c. 134, s. 73) there were words of indemnity.

(f) *Fisher v. Magnay*, (1843) 5 M. & G. 778.

When, therefore, execution has to be levied and any doubt arises as to the identity of the debtor, the question to be asked is whether the man whose person or goods it is proposed to seize is the man against whom judgment has been obtained. If the party in question has appeared in the action, *cadit questio*: rightly or wrongly he has actually made himself the defendant (a). If he has never been served with proceedings the matter is equally clear the other way; he is an entire stranger to the action. The difficulty arises where he has been served, but has not appeared. In *Kelly v. Lawrence* (b), a certain person having a debt due from I. W. Kelly issued a writ against him, which was, by mistake, served upon M. Kelly, the plaintiff, who informed the person serving of the mistake but did not appear in the action and took no further notice of it. Judgment was obtained and a *capias* issued against I. W. Kelly, on which *capias* the plaintiff was arrested. In an action for false imprisonment against the sheriff it was contended that as the plaintiff had been served he was the defendant in the first action, and therefore the execution had rightly issued against him, but it was held that the whole proceedings were a nullity, inasmuch as there never had been any intention on the part of the plaintiff in the original action to sue him. Conversely it would seem that if a writ is served on the party intended, though he is wrongly described in the writ, and though he is not the real debtor, he cannot safely ignore the proceedings, for if he does not appear and judgment is obtained by default, that judgment, while it stands, will be good as against him and execution may issue under it. If A., having supplied goods to B., erroneously thinks that he has supplied them to C. and accordingly sues C. it is one thing; if knowing that he has supplied them to B. he mistakes C. for B. and serves him with process it is another.

Estoppel.

If an execution is levied on the goods of the wrong person he may sometimes be prevented from recovering in an action against the officer executing the writ by virtue of the doctrine of estoppel. He is estopped from asserting his own title if he has intentionally induced the officer to seize, by expressly or impliedly representing

(a) *Per Cur.*, *Walley v. M'Connell*, (b) (1864) 3 H. & C. 1.
(1849) 13 Q. B. p. 912.

the goods in question to be the goods of the execution debtor. There must be something equivalent to a licence on his part. It has been held that a finding of a jury that the owner of the goods misled the sheriff so as to induce him to seize, does not establish an estoppel. In that case the owner had told a falsehood with the object of preventing a seizure, and not of inducing it (a). If a party, against whom there is a valid estoppel, at any time gives notice of the true state of facts to those executing the writ, he is not debarred from suing in respect of anything which they may subsequently do (b).

There are certain cases in which goods may be taken in execution which have ceased to be the property of the execution debtor: the execution creditor claiming by a higher and better title.

Cases where property of strangers may be taken in execution.

(a) By 13 Eliz. c. 5, any alienation of goods or chattels made for the purpose of hindering, delaying and defrauding creditors is void as against them, unless for valuable consideration, and to a party having no notice of the fraud. Goods, therefore, included in such a conveyance, though they cease to be the property of the assignor, are liable to the claims of his judgment creditors, and may be taken in execution (c). An execution on a fraudulent judgment is a fraudulent alienation within the meaning of the statute. Therefore, if a seizure of goods has been made under an execution more than sufficient in amount to exhaust their value, this is no reason against levying under a second writ, even though the officer have no notice of any fraud affecting the first execution, since he ought to give the second creditor the opportunity if he think fit of impeaching the validity of the first judgment (d).

Fraudulent conveyances.

(b) Certain bills of sale are void as against an execution creditor, though good against the grantor (e).

Bills of sale.

(c) A writ of *fi. fa.* directs the seizure of such goods as the debtor has at the time of its issue; therefore at common law

Goods aliened subsequently to issue of writ.

(a) *Freeman v. Cooke*, (1849) 4 Ex. 654. See, too, *Glasspoole v. Young*, (1829) 9 B. & C. 696; *Dawson v. Wood*, (1810) 3 Taunt. 256.

And see *Slobodinsky, In re; Moore, Ex parte*, (1903) 2 K. B. 517.

(d) *Dennis v. Wetham*, (1874) L. R. 9 Q. B. 345.

(e) 41 & 42 Vict. c. 31, s. 8; 45 & 46 Vict. c. 43, s. 5.

(b) *Dunstan v. Paterson*, (1857) 2 C. B. N. S. 495.

(c) *Twyne's Case*, (1601) 3 Rep. 80.

goods aliened subsequently to that date may be followed and seized. By the Statute of Frauds (a) the writ does not "bind the property but from the time such writ shall be delivered to the sheriff, under-sheriffs or coroners to be executed." This provision only protects purchasers for value (b). By 19 & 20 Vict. c. 97, s. 1, purchasers for value, without notice of the delivery of the writ, are protected up to the actual seizure (c). In *Hobart v. Thelluson* (d) the debtor, knowing that a writ was in the sheriff's hands, made an assignment for the benefit of his creditors. It was held that the goods might nevertheless be seized, because the knowledge of the debtor was the knowledge of the trustees.

Estoppel of debtor does not bind execution creditor.

(d) The execution creditor is not bound by the estoppel of his debtor. In *Richards v. Johnson* (e) the plaintiff had taken an assignment of furniture from A. The goods really belonged to B., who had represented to the plaintiff that the goods were A.'s in such manner as to be estopped from setting up his own title. The defendant was a judgment creditor of B., and seized the furniture under a writ of *fi. fa.* It was held that he could set up B.'s title, though B. himself could not have done so.

Rival writs.

Where there are more writs than one to be executed they take precedence in the order of their delivery. But if the execution creditor countermands his writ it loses its priority, and must be postponed to all writs delivered previously to the countermand (f).

How much should be seized under *fi. fa.*

Under a *fi. fa.* only sufficient goods should be seized in the first place to satisfy the judgment debt and the charges (g); if more is taken an action lies at the suit of the execution debtor for any damage occasioned by the breach of duty (h). And the same rule applies in the case of a distress for rates (i).

(a) 29 Car. II. c. 3, s. 15.

(b) *Per* Ashurst, J., *Hutchinson v. Johnston*, (1787) 1 T. R. p. 731; *per* Mellish, L.J., *Ex parte Williams*, (1872) L. R. 7 Ch. p. 317.

(c) It would seem that these statutes apply to county court executions; see Pitt-Lewis' County Court Practice, 3rd ed., p. 688.

(d) (1867) L. R. 2 Q. B. 642.

(e) (1859) 4 H. & N. 660; followed in *Richards v. Jenkins*, (1886-7) 17 Q. B. D.

544; 18 Q. B. D. 451.

(f) *Hunt v. Hooper*, (1844) 12 M. & W. 664.

(g) As to seizing to satisfy landlord's claim for rent, see below, p. 766.

(h) *Gawler v. Chaplin*, (1848) 2 Ex. 503.

(i) *Baker v. Wicks*, (1904) 1 K. B. 743. As to method of recovering excessive charges for distress, see *Re v. Bridport County Court Judge; Edwards. Ex parte*, (1905) 2 K. B. 108.

When goods are seized (a) the seizure *prima facie* operates as a discharge to the judgment debtor to the extent of their value. The sheriff or other officer acquires a special property in the goods which enables him to maintain an action against any third party who is guilty of a tortious act in respect of them (b). And to this remedy he must look in case of a rescue, for, since the seizure *prima facie* discharges the execution debtor to the extent of the value of the goods seized, the officer becomes liable to the same extent to the execution creditor. His duty is absolute, subject only to the usual exception of the act of God and the King's enemies (c).

Responsi-
bility of
officer for
goods seized.

The actual custody of the goods seized should be retained. An abandonment of possession is an abandonment of the execution. It would seem to be otherwise, however, if there is a mere quitting of possession for some temporary purpose (d).

Abandon-
ment by loss
of possession.

It is a right incidental to the due execution of the writ that the officers may remain on the premises for such a time as is reasonably sufficient to enable them to sell the goods. If this time is exceeded their further continuance is a trespass (e); in addition to this, an unreasonable delay in selling is a breach of duty (f).

Right to
remain on
premises.

In the case of county court executions the manner of sale is regulated by 51 & 52 Vict. c. 43, s. 154, and in all other executions above twenty pounds (including expenses), the sale, unless otherwise ordered, is to be by public auction after due advertisement for three days previously (g). Apart from these statutes, there is only the general duty to act in a reasonable and honest manner (h).

Manner of
sale.

If a sheriff can obtain no reasonable bid for goods, it is a proper course for him to keep them unsold, and to return that

Failure of
sale.

(a) As to what amounts to seizure, see *Gladstone v. Padwick*, (1871) L. R. 6 Ex. 203.

(b) *Wilbraham v. Snow*, (1669) 2 Wm. Saund. 47 a.

(c) *Clerk v. Withers*, (1704) Lord Raym. 1072; *Mildmay v. Smith*, (1671) 2 Wm. Saund. 343; *Southcote's Case*, (1600) 4 Rep. 84. The duty was the same in case of an arrest, but now see 40 & 41 Vict. c. 21, s. 31; 50 & 51 Vict. c. 55, s. 16.

(d) *Blades v. Arundale*, (1813) 1

M. & S. 711; *Ackland v. Paynter*, (1820) 8 Price, 95.

(e) *Ash v. Dawnay*, (1852) 8 Ex. 237. They are probably not trespassers *ab initio*. See *Smith v. Eggington*, (1837) 7 A. & E. 167.

(f) *Jacobs v. Humphrey*, (1834) 2 C. & M. 413; *Ayshford v. Murray*, (1870) 23 L. T. N. S. 470.

(g) 46 & 47 Vict. c. 52, s. 145.

(h) *Hernaman v. Bowker*, (1856) 11 Ex. 760. See also *Ex parte Villars* (1874) L. R. 9 Ch. 432.

It has been held, however, that it is for the defendant to negative the damage, and in the absence of evidence one way or the other the plaintiff will be entitled to a nominal verdict (*a*). This rule does not apply to the action for permitting the escape of a person arrested for debt, which, however, is now practically obsolete. In that action the plaintiff was always entitled to succeed although actual loss was negatived; but in such case he could recover nominal damages only (*b*).

In *Mason v. Paynter* (*c*) the plaintiff had obtained judgment, which was afterwards set aside on terms. Before the setting aside he placed his writ in the hands of the sheriff. The sheriff objected, and the plaintiff was put to costs in endeavouring to make him proceed. It was held that he might recover them as damages in an action for the breach of duty. It would have been otherwise, of course, had the judgment been set aside for irregularity, for a party is not entitled to have such a judgment executed, and, indeed, may be liable to an action if he proceeds upon it.

Landlord's
rights in
execution.

By 8 Anne, c. 14, s. 1, no goods or chattels on any land leased for lives, years, or otherwise shall be liable to be taken in execution, unless the execution creditor shall before the removal of the goods pay the landlord all the rent in arrear not exceeding one year's rent (*d*). By 7 & 8 Vict. c. 96, s. 67, if premises are let by the week, or any other term less than a year, the landlord can in no case claim for the arrears of more than four such terms against the execution.

Sheriff's
liability.

It will be observed that the first of these enactments construed literally makes the execution actually unlawful if the landlord is not satisfied. It has been decided, however, that a breach of the statute does not make the sheriff a trespasser or affect his title to the goods taken (*e*). The common practice is for the sheriff to sell, and after paying the landlord's claim to apply the rest of the proceeds to the debt, but he is not bound to follow this course, and he may refuse to go on with the execution until

(*a*) *Per Cur.*, *Wylie v. Birch*, (1843) 4 Q. B. p. 578.

(*b*) *Williams v. Mostyn*, (1838) 4 M. & W. 145; *Clifton v Hooper*, (1844) 6 Q. B. 468.

(*c*) (1841) 1 Q. B. 974.

(*d*) *Wren v. Stokes*, (1902) 1 Ir. R. 167, C. A. As to county court executions, see below, p. 769.

(*e*) *Wharton v. Naylor*, (1848) 12 Q. B. 673; but see *Wren v. Stokes*, *supra*.

the landlord has been paid out by the execution creditor (*a*). If, however, he does not see this done, then he is the person who must answer to the landlord for the rent (*b*). In terms the duty imposed by the statute is absolute, but here again the literal construction is not followed, for without notice or knowledge of the landlord's claim there is no breach of duty (*c*). In the absence of such notice or knowledge only such goods should be seized as are sufficient to meet the debt, costs and charges. If the landlord afterwards makes a claim, he must be paid out and an additional seizure made (*d*).

It has been held that if between the removal of the goods and the payment over of the proceeds to the execution creditor notice is given to the sheriff of rent in arrear, an order may be made by the Court that the landlord be satisfied out of the money in hand (*e*). This might in some cases operate as a hardship on the execution creditor, as the fund thus diminished would not pay him in full, while it might be too late to make a fresh seizure.

If the sheriff removes goods under the colour of an execution he is liable, although the removal be unlawful, as when the goods of the wrong party are taken. The injury to the landlord is not lessened by the fact of the trespass (*f*).

The landlord cannot claim for rent accruing during the continuance of possession under the execution. It must be due at the time of taking the goods, but if so due it makes no difference that by the terms of the contract of tenancy it is payable in advance (*g*). Nor does s. 2 of the Apportionment Act, 1870, apply to rent or other payments in the nature of income actually accrued before the happening of the event on account of which it is proposed to apply the Act (*h*). However, by 14 & 15 Vict. c. 25, s. 2, when growing crops are taken in execution they

What rent
may be
claimed.

(*a*) *Cocker v. Musgrove*, (1846) 9 Q. B. 223.

(*b*) *Riselcy v. Ryle*, (1843) 11 M. & W. 16. Whether there is any liability on the execution creditor seems doubtful: *ibid.*

(*c*) *Arnitt v. Garnett*, (1820) 3 B. & Ald. 440; *Andrews v. Dixon*, (1820) *ibid.* 645.

(*d*) *Per Cur.*, *Gawler v. Chaplin*, (1848) 2 Ex. p. 507.

(*e*) *Arnitt v. Garnett*, *supra*.

(*f*) *Foster v. Cookson*, (1841) 1 Q. B. 419.

(*g*) *Harrison v. Barry*, (1819) 7 Price, 690.

(*h*) *Ellis v. Rowbotham*, (1900) 1 Q. B. 740, C. A.

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